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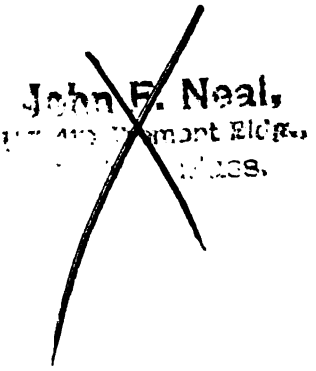
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

By THERON METCALF.

VOLUME IX.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. SAMUEL HUBBARD,
} JUSTICES

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1845, AT BOSTON.

PRESENT

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

HENRY INGALLS *vs.* MARK BILLS & others.

Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect which could not, upon such examination, have been discovered.

A passenger in a coach received an injury solely by reason of the breaking of one of the iron axletrees in which there was a very small flaw, entirely surrounded by sound iron one fourth of an inch thick, and which could not be discovered by the most careful examination externally. *Held*, that the proprietors of the coach were not answerable for the injury thus received.

If a passenger in a coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat.

ASSUMPSIT on an implied promise of the defendants, as coach proprietors and common carriers of passengers, to convey the plaintiff safely from Boston to Cambridge.

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At the trial in the court of common pleas, before *Williams*, C. J. the plaintiff introduced evidence tending to prove that, on the 23d of September 1841, he and several other persons took outside seats, as passengers, on the top of the defendants' coach, to be conveyed from Boston to Cambridge; that on the way, in Court Street, in Boston, while proceeding at a moderate rate, and without coming in contact with any thing, or meeting any obstruction, the hind axletree of the coach broke, one of the hind wheels came off, and the coach settled down on one side, without being overset; that the plaintiff and some other outside passengers, being alarmed, jumped from the top of the coach upon the pavement; and that the plaintiff's left arm was thereby badly injured.

The defendants introduced evidence tending to prove that they had taken all possible care, and incurred extraordinary expense, in order that the said coach should be of the best materials and workmanship; that at the time of the accident, the coach, so far as could be discovered from the most careful inspection and examination externally, was strong, sound and sufficient for the journey; and that they had uniformly exercised the utmost vigilance and care to preserve and keep the same in a safe and roadworthy condition. But the evidence further tended to prove that there was an internal defect or flaw in the iron of the axletree, at the place where it was broken as aforesaid, about three eighths of an inch in length, and wide enough to insert the point of a fine needle or pin — which defect or flaw appeared to have arisen from the forging of the iron, and which might have been the cause of the said breaking; that the said defect was entirely surrounded by sound iron one quarter of an inch thick; and that the flaw or defect could not possibly have been discovered by inspection and examination externally.

Upon this evidence, the defendants moved the court to instruct the jury that it was the duty of the defendants to use all possible care in providing a good coach, in keeping the same in due repair, and in due examination into its condition; and if they took such care. and the accident

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happened, without any fault or negligence on their part, but by reason of a defect which they could not discover, then the verdict should be for them; and that the plaintiff was not entitled to a verdict, unless the jury were of opinion that there was some degree of actual fault or negligence on the part of the defendants.

The judge declined giving these instructions, but submitted the evidence to the jury, with instructions that the defendants were bound by law, and by an implied promise on their part, to provide a coach not only apparently, but really, roadworthy; that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible and could not be discovered upon inspection and examination; and that if the jury were satisfied, from the evidence, that the axletree broke in consequence of the original flaw or defect in the interior thereof, and the plaintiff was injured thereby, he was entitled to a verdict, although that flaw was invisible, and could not be discovered by inspection and examination externally.

The defendants further insisted, that if the plaintiff jumped from the coach without necessity, and that necessity brought upon him by them, they were not liable; and that although a passenger might have jumped off without imprudence, still, if the plaintiff might have remained in his seat without imprudence, his jumping off was to be considered as his own act, and was done at his own peril.

Upon this point the judge directed the jury to inquire whether the plaintiff's jumping off was, under the existing circumstances, an act of reasonable precaution; and instructed them that if the plaintiff was placed in such a perilous situation, in consequence of the defendants' failure to fulfil their obligations aforesaid, that, as a prudent precaution, for the purpose of self-preservation, he was induced to leap from the coach, the owners were answerable for any injury he might have sustained thereby, although it might now appear that he might, without injury, have retained his seat.

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The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

The argument was had at the last March term.

Parsons, for the defendants. Carriers of passengers are not liable for accidents which no skill or care can prevent. They are not insurers, and are only bound to transport passengers as safely as human foresight and care will permit. The distinction between the liabilities of carriers of goods and carriers of passengers has been long established. 2 Kent Com. (3d ed.) 598–601. Story on Bailm. (3d ed.) §§ 498, 571 *a*, 590, 592. *Aston* v. *Heaven*, 2 Esp. R. 533. *McKinney* v. *Neil*, 1 McLean, 540. *Camden & Amboy Rail Road Co.* v. *Burke*, 13 Wend. 611, 627. *Jackson* v. *Tollett*, 2 Stark. R. 37. *Dudley* v. *Smith*, 1 Campb. 167. *Hollister* v. *Nowlen*, 19 Wend. 236. *Crofts* v. *Waterhouse*, 3 Bing. 321, and 11 Moore, 137. *Boyce* v. *Anderson*, 2 Pet. 150. *Stokes* v. *Saltonstall*, 13 Pet. 181. *Ware* v. *Gay*, 11 Pick. 106. It is impossible to distinguish the case at bar from the case of *Christie* v. *Griggs*, 2 Campb. 80, where Mansfield, C. J. said, "if the axletree was sound, as far as human eye could discover, the defendant was not liable."

L. Williams & Nutter, for the plaintiff. Though there is a well settled distinction between the liabilities of common carriers of goods, and passenger carriers, yet the latter are liable for the insufficiency of their carriages. They warrant that their vehicles are fit for the use to which they are applied. This principle removes the apparent discrepancy in the adjudged cases. *Israel* v. *Clark*, 4 Esp. R. 259. *Bremner* v. *Williams*, 1 Car. & P. 414. 2 Stephens Nisi Prius, 983. 1 Selw. N. P. (11th ed.) 420. In *Crofts* v. *Waterhouse*, 3 Bing. 321, Best, C. J. says, the coachman (among other things) must be provided with "a coach and harness of sufficient strength, and properly made. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." In *Christie* v. *Griggs*, 2 Campb. 80, Mansfield, C. J. said it lay on the defendant "to show that

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the coach was as good a coach as could be made;" and this is recognized as law, in 11 Pick. 112.

The case of *Sharp* v. *Grey*, 9 Bing. 457, and 2 Moore & Scott, 620, is decisive for the present plaintiff. The action in that case, as in the case at bar, was assumpsit on an undertaking to convey the plaintiff safely. Gaselee, J. said, "the burthen lay on the defendant to show there had been no defect in the construction of the coach. Whether there had been or not, was a question of fact on which the jury have determined. In *Christie* v. *Griggs*, the accident was occasioned by a kennel which crossed the road, and not by any defect in the vehicle." Bosanquet, J. said, "the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequence, upon the same principle as a ship owner who furnishes a vessel which is not seaworthy." A ship owner is answerable for the consequences of a *latent* defect in his vessel. *Putnam* v. *Wood*, 3 Mass. 481. *Lyon* v. *Mells*, 5 East, 428. Abbott on Ship., (4th Amer. ed.) 218.

The decision in *Crofts* v. *Waterhouse*, (ubi sup.) does not conflict with the doctrine for which the plaintiff contends. That was an action for negligence, and of course could not be maintained without proof of negligence.

Greenleaf, in reply. The decision in *Sharp* v. *Grey* went no further than former decisions. In that case, the defect in the axletree might have been discovered on inspection; and it was left to the jury "to consider whether there had been, on the part of the defendant, that degree of vigilance which was required by his engagement to carry the plaintiff safely." The jury found that there had not been such vigilance, and the court refused to set aside the verdict. The defendant was held liable for *negligence*, and not for unavoidable accident. In the case at bar, the defect in the axletree could not have been discovered. And *Harris* v. *Costar*, 1 Car. & P. 636, shows that a count upon an undertaking to carry a passenger safely cannot be supported without proof of some

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actual negligence of the defendant. See *Bretherton* v. *Wood* 3 Brod. & Bing. 54.

The silence of the books, on the subject of an action by a passenger against a ship owner for injury caused by a latent defect in a vessel, is an answer to the plaintiff's argument drawn from a simile used by Bosanquet, J. in *Sharp* v. *Grey*.

HUBBARD, J. The question presented in this case is one of much importance to a community like ours, so many of whose citizens are engaged in business which requires their transportation from place to place in vehicles furnished by others; and though speed seems to be the most desirable element in modern travel, yet the law points more specifically to the security of the traveller.

Under the charge of the learned judge who tried this case, we are called upon to decide whether the proprietors of stage coaches are answerable for all injuries to passengers arising from accidents happening to their coaches, although proceeding from causes which the greatest care in the examination and inspection of the coach could not guard against, or prevent; or, in other words, whether a coach must be alike free from secret defects, which the owner cannot detect, after the most critical examination, as from those which might, on such an examination, be discovered.

The learned judge ruled, that the defendants, as proprietors of a coach, were bound by law, and by an implied promise on their part, to provide a coach, not only apparently but really roadworthy, and that they were liable for any injury that might arise to a passenger from a defect in the original construction of the coach, although the imperfection was not visible, and could not be discovered upon inspection and examination.

The law respecting common carriers has ever been rigidly enforced, and probably there has been as little relaxation of the doctrine, as maintained by the ancient authorities, respecting this species of contract, as in any one branch of the common law. This arises from the great confidence necessarily reposed in persons engaged in this employment. Goods are

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entrusted to their sole charge and oversight, and for which they receive a suitable compensation; and they have been, and still are, held responsible for the safe delivery of the goods, with but two exceptions, viz. the act of God and the king's enemies; so that the owners of goods may be protected against collusive robberies, against thefts and embezzlements, and negligent transportation. But in regard to the carriage of passengers, the same principles of law have not been applied; and for the obvious reason, that a great distinction exists between persons and goods, the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight, in the maintenance of their rights, which the owners of goods cannot do, who have entrusted them to others.

It is contended by the counsel for the plaintiff, that the proprietor of a stage coach is held responsible for the safe carriage of passengers so far that he is a warrantor that his coach is roadworthy, that is, is absolutely sufficient for the performance of the journey undertaken; and that if an accident happens, the proof of the greatest care, caution and diligence, in the selecting of the coach, and in the preservation of it during its use, will not be a defence to the owner; and it is insisted that this position is supported by various authorities. The cases, among many others cited, which are more especially relied upon, are those of *Israel* v. *Clark*, 4 Esp. R. 259; *Crofts* v. *Waterhouse*, 3 Bing. 319; *Bremner* v. *Williams*, 1 Car. & P. 414; and *Sharp* v. *Grey*, 9 Bing. 457. If these cases do uphold the doctrine for which they are cited, they are certainly so much in conflict with other decided cases, that they cannot be viewed in the light of established authorities. But we think, upon an examination of them and comparing them with other cases, they will not be found so clearly to sustain the position of the plaintiff, as has been argued.

It must be borne in mind, that the carrying of passengers for hire, in coaches, is comparatively a modern practice; and that though suits occur against owners of coaches, for the

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loss of goods, as early as the time of Lord Holt, yet the first case of a suit to recover damages by a passenger, which I have noticed, is that of *White* v. *Boulton*, Peake's Cas. 81, which was tried before Lord Kenyon in 1791, and published in 1795. That was an action against the proprietors of the Chester mail coach for the negligence of the driver, by reason of which the coach was overturned, and the plaintiff's arm broken, and in which he recovered damages for the injury; and Lord Kenyon, in delivering his opinion, said, "when these [mail] coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." The correctness of the opinion cannot be doubted, in its application to a case of negligence. The meaning of the word "safely," as used in declarations for this species of injury, is given hereafter.

The next case which occurred was that of *Aston* v. *Heaven*, 2 Esp. R. 533, in 1797, which was against the defendants, as proprietors of the Salisbury stage coach, for negligence in the driving of their coach, in consequence of which it was overset and the plaintiff injured. This action was tried before Eyre, C. J. It was contended by the counsel for the plaintiff, that coach owners were liable in all cases, except where the injury happens from the act of God or of the king's enemies; but the learned judge held that cases of loss of goods by carriers were totally unlike the case before him. In those cases, the parties are protected by the custom; but as against carriers of persons, the action stands alone on the ground of negligence.

The next case was that of *Israel* v. *Clark*, 4 Esp. R. 259, in 1803, where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach, in consequence of the axletree having broken; and one count alleged the injury to have arisen from the overloading of the coach. It was contended that if the owners carried more passengers than they were allowed by act of parliament, that should be deemed such an overloading. To this Lord Ellenborough, who tried the cause, assented, and said, "if they

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carried more than the statute allowed, they were liable to its penalties; but they might not be entitled to carry so many; it depended on the strength of the carriage. They were bound by law to provide sufficient carriages for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established." This is one of the cases upon which the present plaintiff specially relies. It was a *nisi prius* case, and it does not appear upon which count the jury found their verdict. But the point pending in the present case was neither discussed nor started, viz. whether the accident arose from the negligence of the owner in not providing a coach of sufficient strength, or from a secret defect not discoverable upon the most careful examination. No opinion was expressed whether the action rests upon negligence or upon an implied warranty. But it was stated that the defendants were bound by law to provide sufficient carriages for the passage, and, at all events, that there should be a clear landworthiness in the carriage itself.

The general position is not denied with regard to the duty of an owner to provide safe carriages. The duty, however, does not in itself import a warranty. The judge himself may have used stronger expressions, in the terms "landworthiness in the carriage," than he intended by the thought of seaworthiness in a ship, and the duty of ship owners in that respect. If the subject had been discussed, and the distinctions now presented had been raised, and then the opinion had followed, as expressed in the report, it would be entitled to much more consideration than the mere strength of the words now impart to it.

The next case was that of *Christie* v. *Griggs*, 2 Campb. 79, in 1809. There the axletree of the coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Sir James Mansfield, in instructing the jury, said, "as the driver had been cleared of negligence, the question for the jury was as to the sufficiency of the coach. If the

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axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers For the goods, the carrier was answerable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered."

The case of *Bremner* v. *Williams*, 1 Car. & P. 414, in 1824, is relied on by the plaintiff. There, Best, C. J. said he considered that "every coach proprietor warrants to the public that his stage coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey." And so, in *Crofts* v. *Waterhouse*, 3 Bing. 321, in 1825, Best, C. J. said, "the coachman must have competent skill, and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." But though this language is strong, and would apparently import a warranty, on the part of the stage proprietor, as to the sufficiency of his coach, yet Park, J. in the same case said, "a carrier of passengers is only liable for negligence." This shows that the court did not mean to lay down the law, that a stage proprietor is in fact a warrantor of the sufficiency of his coach and its equipments, but that he is bound to use the utmost diligence and care in making suitable provision for those whom he carries; and we think such a construction is warranted by the language of the same earned judge, (Best,) in the case of *Harris* v. *Costar*, 1 Car & P. 636, in 1825, where the averment in the declaration was, that the defendant undertook to carry the plaintiff *safely*

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The judge held that it did not mean that the coach proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

But the case mainly relied upon by the plaintiff is that of *Sharp* v. *Grey*, 9 Bing. 457, where the axletree of a coach was broken and the plaintiff injured. There the axle was an iron bar enclosed in a frame of wood of four pieces, secured by clamps of iron. The coach was examined, and no defect was obvious to the sight. But after the accident, a defect was found in a portion of the iron bar, which could not be discovered without taking off the wood work; and it was proved that it was not usual to examine the iron under the wood work, as it would rather tend to insecurity than safety. It does not appear by the statement, that the defect could not have been seen, on taking off the wood work; but it would rather seem that it might have been discovered. However that may be, the language of different judges, in giving their opinions, is relied upon as maintaining the doctrines contended for by the plaintiff. Gaselee, J. held that "the burthen lay on the defendant to show there had been no defect in the construction of the coach." Bosanquet, J. said, "the chief justice" (who tried the case) "held that the defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not roadworthy, and the defendant is liable for the consequence, upon the same principle as a ship owner who furnishes a vessel which is not seaworthy." And Alderson, J. said he was of the same opinion, and that "a coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. The injury in the present case appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy."

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This case goes far to support the plaintiff in the doctrine contended for by his counsel, as it would seem to place the case upon the ground that the coach proprietor must, at all events, provide a coach absolutely and at all times sufficient for the journey, and that he is a warrantor to the passenger to provide such a coach. But we incline to believe the learned judges gave too much weight to the comparison of Bosanquet, J. viz. that a coach must be roadworthy on the same principle that a ship must be seaworthy. We think the comparison is not correct, and that the analogy applies only where goods are carried, and not where passengers are transported. And no case has been cited, where a passenger has sued a ship owner for an injury arising to him personally in not conducting him in a seaworthy ship. If more was intended by the learned court, than that a coach proprietor is bound to use the greatest care and diligence in providing suitable and sufficient coaches, and keeping them in a safe and suitable condition for use, we cannot agree with them in opinion. To give their language the meaning contended for in the argument of the case at bar is, in fact, to place coach proprietors in the same predicament with common carriers, and to make them responsible, in all events, for the safe conduct of passengers, so far as the vehicle is concerned. But that the case of *Sharp* v. *Grey* is susceptible of being placed on the ground which we think tenable, namely, that negligence and not warranty lies at the foundation of actions of this description, may be inferred from the language of Mr. Justice Park, who, in giving his opinion, says, "this was entirely a question of fact. It is clear that there was a defect in the axletree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the defendant, or not." And Tindal, C. J. who tried the cause before the jury, left it for them to consider whether there had been that vigilance which was required by the defendant's engagement to carry the plaintiff safely; thus apparently putting the case on the ground of negligence and not of warranty. See also *Bretherton* v. *Wood*, 3 Brod. &

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Bing. 54, and 6 Moore, 141. *Ansell* v. *Waterhouse*, 6 M. & S. 385, and 2 Chit. R. 1.

The same question has arisen in this country, and the decisions exhibit a uniformity of opinion that coach proprietors are not liable as common carriers, but are made responsible by reason of negligence. In the case of *Camden & Amboy Rail Road Co.* v. *Burke*, 13 Wend. 626, the court say that the proprietors of public conveyances are liable at all events for the baggage of passengers; but as to injuries to their persons, they are only liable for the want of such care and diligence as is characteristic of cautious persons. And in considering the subject again in the case of *Hollister* v. *Nowlen*, 19 Wend. 236, they say, that "stage coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the *passenger* and his *baggage*. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence or skill; but in relation to baggage, they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident or the public enemies."

In a case which occurred in respect to the transportation of slaves, (*Boyce* v. *Anderson*, 2 Pet. 155,) Chief Justice Marshall, in giving the opinion of the court, says, "the law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to *new cases*. We think it has not been applied to living men, and that it ought not to be applied to them." So in the case of *Stokes* v. *Saltonstall*, 13 Pet. 181, the question arose and was thoroughly discussed; and the same opinions are maintained as in the cases above cited from Wendell. And the whole subject is examined by Judge Story, in his Treatise on Bailments, §§ 592–600, with his usual learning; and his result is the same.

If there is a discrepancy between the English authorities which have been cited, we think the opinions expressed by

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Chief Justice Eyre and Chief Justice Mansfield are most consonant with sound reason, as applicable to a branch of the law comparatively new, and, though given at *nisi prius*, are fully sustained by the discussions which the same subject has undergone in the courts of our own country. We have said, as being most consonant with sound reason, or good common sense, as applied to so practical a subject; because, if such a warranty were imposed by force of law upon the proprietors of coaches and other vehicles for the conveyance of passengers, they would in fact become the warrantors of the work of others, over whom they have no actual control, and — from the number of artizans employed in the construction of the materials of a single coach — whom they could not follow. Unless, therefore, by the application of a similar rule, every workman shall be held as the warrantor, in all events, of the strength, sufficiency and adaptation of his own manufactures to the uses designed — which, in a community like ours, could not be practically enforced — the warranty would really rest on the persons purchasing the article for use, and not upon the makers.

If it should be said that the same observations might be applied to ship owners, the answer might be given, that they have never been held as the warrantors of the safety of the passengers whom they conveyed; and as to the transportation of goods, owners of general ships have always been held as common carriers, for the same reasons that carriers on land are bound for the safe delivery of goods entrusted to them. But as it respects the seaworthiness of a ship, the technical rules of law respecting it have been so repeatedly examined, and the facts upon which they rest so often investigated, that the questions which arise are those of fact and not of law, and in a vast proportion of instances depend upon the degree of diligence and care which are used in the preservation of vessels, and practically resolve themselves into questions of negligence; so that the evils are very few that arise from the maintenance of the doctrine that a ship must be seaworthy in order to be the subject of insurance.

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The result to which we have arrived, from the examination of the case before us, is this: That carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. And we are of opinion that the instructions, which the defendants' counsel requested might be given to the jury in the present case, were correct in point of law, and that the learned judge erred in extending the liability of the defendants further than was proposed in the instructions requested.

The point arising on the residue of the instructions was not pressed in the argument; and we see no reason to doubt its correctness, provided the peril to which the plaintiff was exposed arose from a defect or accident for which the defendants were otherwise liable. *Jones* v. *Boyce*, 1 Stark. R. 493.

New trial granted.

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Edwin A. Griswold *vs.* Jabez Pratt.

While the United States bankrupt act of 1841 was in force, proceedings against a debtor, under the insolvent law of the State, were unauthorized and void, if the debtor and his property were subject to the operation of that bankrupt act, although no proceedings under it were had against him.

This was an action of trover, brought by the assignee of Orin D. Myrick, and was submitted to the court on the following statement of facts: On the 3d of March 1842, said Myrick, being in a state of bankruptcy, and owing over $2000, applied to a master in chancery, in this county, for the benefit of the insolvent law of 1838, *c.* 163. On the 16th of said March, the plaintiff was appointed, in the manner prescribed by said law, assignee of the goods and estate of said Myrick. Afterwards, and before the commencement of this suit, the plaintiff demanded of the defendant the property alleged in the plaintiff's declaration to have been converted by the defendant, and the defendant refused to deliver it; alleging that the proceedings under said insolvent law were void, by reason of the operation of the United States bankrupt act of 1841, which took effect from and after the 1st of February, 1842, before any proceedings were had, in conformity with the said insolvent law, touching the premises.

The property, described in the plaintiff's declaration, had been attached by the defendant, a deputy sheriff, as the property of said Myrick, on the 25th of December 1841, by virtue of a writ in favor of J. Shepard and others; and on the 28th and 29th of said December, by virtue of other writs. All these writs were issued from the court of common pleas for this county, and were duly entered at the April term thereof. in 1842. The defendant, as deputy sheriff, and by virtue of said writs and attachments, held said property, at the time of the aforementioned demand thereof by the plaintiff, and has since sold the same on executions, duly issued from the court of common pleas, on judgments recovered in the suits on which said attachments were made. But the said property

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and the proceeds thereof were insufficient to satisfy said executions.

It was agreed that if the plaintiff was entitled to recover, a jury should assess his damages; otherwise, that a nonsuit should be ordered.

The argument was had at the last March term.

Goodrich, for the plaintiff.

Plimpton, for the defendant.

Dewey, J. This case presents the interesting question of the effect of the United States bankrupt law, enacted in 1841, upon the insolvent laws of the individual States, then in force. The facts here stated raise the direct question, whether the enactment of a national bankrupt law does, *ipso facto*, suspend and abrogate, during the continuance of such law, all general insolvent laws of the several States, so far as they have reference to future cases, and are applicable to the same persons, the same contracts, and the same assets, as are made subject to proceedings under the bankrupt law.

The individual through whom both parties claim title to the property now in controversy was, as is agreed, indebted in such an amount, and under such circumstances, as fully to subject his person and property to proceedings in bankruptcy, at the time of his making application to a master in chancery for the institution of proceedings against himself, under the insolvent law of this Commonwealth, (*St.* 1838, *c.* 163,) and under which proceedings the plaintiff claims, as assignee of the insolvent, to hold the property.

The general question of the validity and the effect of state insolvent laws has been very fully considered in the leading cases of *Sturges* v. *Crowninshield*, 4 Wheat. 122, and *Ogden* v. *Saunders*, 12 Wheat. 213. In default, on the part of the national government, to enact a bankrupt law, many of the States had enacted insolvent laws, of a very extended character, directly discharging all debts of the insolvent, as well those contracted previously as subsequently to the passage of those laws. These state laws were apparently coextensive, in all their purposes and effects, with a general bankrupt law.

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Under this course of state legislation, cases frequently arose as to the effect of a discharge under such insolvent laws, and questions as to the validity of such laws came to be fully discussed before the supreme court of the United States. The broad ground was originally taken, that such state insolvent laws were, under all circumstances, invalid, being in violation of the provisions of the constitution of the United States authorizing congress to establish uniform laws, on the subject of bankruptcy, throughout the United States, and the further provision that no State should pass any law impairing the obligation of contracts. The result of these judicial inquiries and decisions was, as is well known, that it was held that the power, vested in congress, to enact a bankrupt law, did not supersede the right and authority of the several States to enact insolvent laws, while the power remained dormant, and was not called into exercise by any act of legislation of congress on the subject; and that the mere existence of the power in the national government to act on the subject was not an absolute restriction upon the powers of the several States to act in the matter, in the absence of any existing bankrupt law; holding, however, that the other provision of the constitution, already adverted to, that the State should pass no law impairing the obligation of contracts, would render invalid any state insolvent law, so far as it authorized the granting of a discharge from liability for debts contracted before the enactment of such state insolvent law. The great question in the cases referred to was, whether the power, vested in the national government, to establish a uniform bankrupt law, did not supersede all state legislation on the subject. The question of the effect of the actual exercise of this power by the congress of the United States was only incidentally considered; as no such act was in force, or had been, except for a very short period, and that long previous. In these discussions and judicial opinions, which were pronounced by the members of the supreme court of the United States, it seems, however, to be assumed or held as unquestioned, that if the authority, conferred by the constitution, to

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establish such uniform bankrupt system, was exercised by congress, and a bankrupt law was actually in force, all state legislation on the matter would be at once superseded; certainly, as to all cases falling within the provisions of such bankrupt law. Thus, in *Sturges* v. *Crowninshield*, 4 Wheat. 196, it is said, "it is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States." See also *Ogden* v. *Saunders*, 12 Wheat. 213.

This subject was somewhat considered by this court, in *Blanchard* v. *Russell*, 13 Mass. 1, where the defence relied upon was a discharge under the insolvent law of the State of New York. The plaintiff insisted that the insolvent law of New York was invalid, being repugnant to the constitution of the United States authorizing congress to establish a uniform bankrupt law. This broad proposition was not sustained, but it was said by the court, "there is no doubt that if a bankrupt law should be passed by congress, the respective acts of the several States would be superseded; because their existence would then be inconsistent with that uniformity which it was the wish of the people to establish." Again, in the recent case of *Judd* v. *Ives*, 4 Met. 401 — a case that occurred since the enactment of the bankrupt law, but where the precise question raised was more limited in its character than in the present case, being that of the effect of the bankrupt law upon cases then pending under a state insolvent law, but in which proceedings had been instituted before the bankrupt law took effect — the judge who delivered the opinion of the court stated the principle strongly, that the passage of the bankrupt law superseded the operation of the insolvent law of this Commonwealth, and cited with approbation the doctrine of Story, J. in *Eames's case*, (since reported in 2 Story R. 322,) and the opinion in *Blanchard* v. *Russell*, 13 Mass. 1. The rule was stated, in the case of *Judd* v. *Ives*, with the limitation only that the bankrupt law did not suspend the operation of the insolvent law in cases where the proceedings had been commenced previously to the existence and operation of the bankrupt law.

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In *Eames's case*, already cited, the opinion of Mr. Justice Story seems to be full and direct to the point now under consideration; holding that when congress do pass a bankrupt act, the state insolvent laws, as to future cases, can no longer operate upon persons or cases within the purview of such act, and that the Massachusetts insolvent law does act upon the same subject matter, and the same persons, as the bankrupt law. It is proper, however, to remark, that in that case proceedings had been instituted under the bankrupt law, and hence, necessarily, there had arisen a case of conflict of jurisdiction. We understand, however, the doctrine of Mr. Justice Story to be broadly asserted, and extensive enough to embrace the present case.

The only case cited by the plaintiff's counsel, as sustaining a contrary doctrine, is *Ziegenfuss's case*, 2 Iredell, 463. It was there conceded that the effect of the bankrupt law was necessarily to suspend all state laws with which it came in conflict; but it was contended, and the principle was sanctioned by the court, that a state insolvent law may exist and operate with full vigor, until the bankrupt law attaches itself upon the person or property of the debtor, by proceedings instituted in bankruptcy; and it was further held, that no case of conflict could arise, until after the proceedings in bankruptcy had reached that stage in which the debtor had been judicially declared a bankrupt.

This principle, that until proceedings in bankruptcy are actually instituted, the state insolvent law may be allowed to operate upon the person and property of the debtor, although at first view it may seem plausible, cannot, we think, be sustained. The right to proceed under the insolvent law of Massachusetts, the bankrupt law being in full force, must be placed upon a firmer basis than that of the failure of the insolvent to apply to the district court of the United States for the institution of proceedings in bankruptcy. If the proceedings under the insolvent law are valid at all, they must be valid to the extent of carrying out and perfecting such proceedings after they have been once instituted. Such effect has always

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been admitted to attach to proceedings legally commenced before the bankrupt law went into operation, but then pending. Sound principle would require that, in all cases where proceedings could be legally instituted, they should have the legal capability of being perfected and closed, under the state law. But under the view taken of this question on all sides, and as conceded on the part of the plaintiff, the proceedings under the state insolvent law, by virtue of which he claims the property in controversy, might be wholly superseded and rendered void, at the will of the insolvent debtor, by filing his petition in bankruptcy, during any stage of the proceedings under the insolvent law, before his assets should be divided among his creditors.

It is to be borne in mind that the bankrupt law of 1841 was of a more extended character than the earlier bankrupt law, or the English statutes of bankruptcy. It was not confined to traders, and included cases of voluntary application to be declared a bankrupt, upon the petition of the debtor. For this reason, the difficulty of discriminating between a bankrupt law and the state insolvent laws has been increased. Indeed, except in name, and in reference to the incompetency of the latter to discharge debts contracted before their enactment, they had become similar in their purposes and effects

The policy of Massachusetts, to a late period, (1838,) was uniform; enacting no insolvent law, but awaiting the action of the national legislature on the subject which had been so wisely made a national one. The statute of 1838 was at once suspended, by direct legislation, during the existence of the bankrupt law. For nearly half a century after the adoption of the constitution of the United States, we had no insolvent law; and this state of things was, doubtless, in some measure, to be attributed to the strong impression here entertained, that all state insolvent laws of a general character, and providing for the discharge of debtors, were unconstitutional. Other States took a different view of this question, and enacted statutes, really of bankruptcy, though assuming the name of insolvent laws; and at length our own legisla-

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ture adopted a system of proceedings in insolvency, under which the present question arises.

As sustaining our views upon the general question of the effect of a bankrupt law in superseding state insolvent laws, we may also refer to the opinion of this court in *Carter* v. *Sibley*, 4 Met. 298. The question there raised was, whether the *St.* of 1836, *c.* 238, which regulated the assignment and distribution of the property of insolvent debtors, was repealed by the more general insolvent law of 1838, *c.* 163. It was not in terms; but it was held that, so far as it affected the same class of persons, the latter statute superseded the former; that it could not have been within the intention of the legislature to have in existence two distinct systems, operating upon the same persons and property, and leaving it to the option of the debtor to elect one or the other at his pleasure.

Here, as in the case alluded to, the insolvent law of Massachusetts and the bankrupt law of congress affect the same persons, the same property, and the same rights. If both are in force, the debtor may elect under which he will proceed, and with the further embarrassment to all concerned, that the proceedings under the state law will be liable, at any time, to be superseded by an application for proceedings in bankruptcy. The *St.* of 1836, *c.* 238, was held to have been repealed by *St.* 1838, *c.* 163, as to all cases embraced within the provisions of the latter; as otherwise two distinct and independent systems would be in force, operating upon the same persons and the same property. The case is much stronger where the question is, whether the national legislation, under the authority to establish a uniform bankrupt law throughout this Union, supersedes state legislation, affecting the same persons and same rights; and we can have no doubt that, upon the enactment of a bankrupt law, such law must supersede all local law affecting the same persons and property, and having the same general objects. If this were not so, the law would be imperfect, and all the evils would be experienced of two different systems of distributing the assets of insolvent debtors, with the strongly objectionable feature, that one of those systems, the

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state insolvent law, was of such a character as to be liable to have the proceedings under it superseded by proceedings being instituted under the other, at the election of the insolvent, or of his creditors, if a case existed for compulsory bankruptcy.

Considering our insolvent law to be a system introduced for the purpose of sequestering the effects of an insolvent debtor, and of discharging him from all debts contracted after the enactment of the law, we are satisfied that the two systems cannot stand together; that the provision of the constitution, authorizing congress to establish a uniform bankrupt law, does not of itself prevent the enacting of insolvent laws by the individual States; yet that when the power is exercised by congress, and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases, and that this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result.

The consequence is, therefore, that in the present case the proceedings before the master in chancery, under the state insolvent law, were unauthorized, and that the plaintiff, as assignee of the insolvent, has no legal claim to the property in controversy. *Plaintiff nonsuit.*

ABNER L. CUSHING *vs.* CHARLES ARNOLD & another.

An execution may be legally issued on a judgment, though an action on the judgment is pending.

When the real estate of an insolvent debtor is seized on execution, before the first publication of a messenger's notice that a warrant, under *St.* 1838, *c.* 163, has issued against such debtor's estate, the judgment creditor will hold the estate so seized, if the levy thereon be afterwards duly completed, though it be not completed until after such publication.

An application to the court for the exercise of the chancery powers conferred by *St.* 1838, *c.* 163, § 18, in cases arising under that statute, must be by bill, petition, or other proceeding in chancery: In a writ of entry brought by an assignee of an insolvent debtor to try the title to land set off on an execution against the debtor, the rights of the parties are to be determined upon strict principles of law.

WRIT OF ENTRY to recover three fourths of one undivided sixth part of a parcel of land and a dwelling-house situate in

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Lyman Place, in Boston. The parties submitted the case to the court upon the following agreed statement of facts:

On the 21st of January 1842, Isaac Adams was seized of the demanded premises, in fee simple, subject to his mother's right of dower in the same; and on that day, the tenants, having an execution in their favor against said Isaac, put the same into the hands of an officer, about 9½ o'clock, A. M. The officer forthwith proceeded to levy said execution on the demanded premises. On the 20th of January 1842, a suit was pending against said Isaac, which had been commenced against him by the present tenants, upon the judgment on which the aforesaid execution issued; and on that day, the counsel for said Isaac, by said Isaac's instructions, offered to the said tenants' counsel a certain sum, and informed him that said Isaac had requested him (said Isaac's counsel) to say, that unless the tenants' counsel accepted that proposition, said Isaac should take the benefit of the insolvent law forthwith, or on that day. The tenants' counsel replied, that said Isaac might do it as soon as he pleased. At a second interview of said counsel, the same proposition was made and declined; but it was proposed that the tenants' counsel should have until the next day, (January 21st,) at 10 o'clock, A. M. to consider the subject and give his answer. On the next day, when said Isaac's counsel called on the tenants' counsel for his answer, the latter told him that he had taken out an execution on the judgment that was sued, and had given it to an officer, who had levied on said Isaac's real estate; and that he should decline the offer.

Immediately before taking out said execution, the court of common pleas, in which the action on said judgment was pending, had, on motion of the present tenants' counsel, made an entry of "neither party" in said action. After the issuing of said execution, said court, on motion of said Isaac's counsel, changed the entry of "neither party" to that of "nonsuit." On the same day of the issuing of said execution, (January 21st,) but after 10 o'clock, A. M. said Isaac filed his petition, before a master in chancery, for the benefit of the

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insolvent law, and thereupon a messenger's notice thereof was published, in the afternoon of the same day, in two daily newspapers, printed in Boston; and such proceedings were subsequently had, that the present demandant was appointed assignee of said Isaac Adams; and the said master in chancery, on the 22d of February 1842, by his deed of that date, assigned and conveyed to the demandant all the estate, real and personal, of said Isaac Adams, including all such estate of which said Isaac was seized or possessed, interested in or entitled to, on the 21st of January then last past.

By the return on the execution upon which the demanded premises were set off to the tenants, it appears that the officer seized said premises on the 21st of January 1842, "at nine o'clock and thirty minutes A. M.;" that said Isaac Adams, though he had notice, and was requested by the officer, on said 21st of January, to choose an appraiser, refused and neglected to choose one; that, on the same day, the officer appointed two appraisers, and the present tenants one; that on the 22d of said January, the appraisers were sworn, and proceeded to appraise the demanded premises; and that the officer, on the same day, gave seizin and possession to the present tenants.

Tenants to be defaulted, if the demandant, on these facts, is entitled to recover; otherwise, demandant to be nonsuit.

The argument was had at the last March term.

Cushing, pro se.

A. H. Fiske, for the tenants.

Dewey, J. It is contended that the levy under which the tenants claim is void and unavailing to them, because the execution under which it was made was illegally issued. The objection taken is, that a suit, brought to recover the debt due on this judgment, was pending in court at the time when the creditors took out their execution on the judgment. The fact relied upon is very questionable, as the record shows a discontinuance of that action before the issuing of the execution; originally, by the entry of a nonsuit and default, and subsequently, by a correction of the record, and entering

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a nonsuit merely; which entry may properly take effect as of the date of the former entry. But independently of this matter, and however that may be, the fact of the pendency of an action on this judgment is of no importance. If a year had not expired after the rendition of the judgment, it was competent for the creditor to take out an execution, notwithstanding the pendency of an action on such judgment. The execution would be valid, though the levy of it might operate to defeat a recovery in the action.

The second objection taken to the levy of the execution is, that it had not taken effect so as to divest the property of the debtor, before the institution of the proceedings in insolvency, and therefore the estate passed to the assignee. The extent of the right of the assignee under the deed of assignment, and to what period of time it attaches, are questions now very well settled. Such deed transfers all the property of the insolvent, as held at the time of the first publication by the messenger. *St.* 1838, *c.* 163, § 5. *Clarke* v. *Minot*, 4 Met. 346. It is admitted that the levy was commenced before the petition for proceedings in insolvency was filed, but it is said that it was not completed until after publication. But, as well by statute as by the decisions of this court, the levy of an execution is to take effect from the time of the seizure on execution. Rev. Sts. *c.* 73, § 22. *Heywood* v. *Hildreth*, 9 Mass. 393. *Waterhouse* v. *Waite*, 11 Mass. 210. It is then suggested that the provisions of the Rev. Sts. *c.* 73, § 22, are in conflict with the *St.* of 1838, *c.* 163, and that this latter statute has therefore operated to repeal the former. But we do not perceive any such conflict. The provisions of the latter statute only vest in the assignee all the rights of property of the debtor, as they exist at the time of the publication, and dissolve all attachments on mesne process, but do not dissolve any lien acquired by a seizure on execution.

The third objection taken to the levy is founded upon the provisions of *St.* 1841, *c.* 124, § 3, prohibiting the debtor from procuring his property to be attached, or seized on execution; and the demandant contends that, for this cause, the levy may

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be avoided. If the effect of such agency of the debtor would, under the provisions of this statute, avoid a levy, as is contended by the demandant, yet it cannot avail here, because the fact of such agency is not admitted in the case agreed by the parties. If, however, this objection be waived, and we look at the evidence from which it is to be inferred, we see nothing to authorize us to believe that the levy of this execution was through the procuration of the debtor. Indeed every thing in the case leads to the contrary conclusion, and shows that the proceedings were, as respects the debtor, *in invitum*.

We are earnestly invoked by the demandant to give him relief under the chancery powers conferred upon this court by § 18 of *St.* 1838, *c.* 163; and these, it is urged, may and ought to be exercised, upon two grounds. 1st. Because the seizure and levy by the tenants were in violation of the great purposes and objects of the insolvent law, viz. the equal distribution of the assets of the insolvent debtor among all his creditors. 2d. Because the tenants availed themselves of an unfair advantage, in making this levy pending a negotiation for a compromise between the parties. In reference to these suggestions, it may be remarked, that an application to the chancery powers to be exercised by this court, under the statute of 1838, must be by bill, petition, or other proceeding in chancery. But the case before us is a writ of entry pending before a court of common law, and the rights of the litigant parties are to be determined upon strict principles of law; and whatever chancery powers we may possess, if called into exercise by the proper proceedings moved in chancery, they have no proper place in the present action, in which the pure legal question arises, which party has the better legal title to the demanded premises. We have not thought it necessary to consider whether there was any violation of good faith, in the making of this levy at the time and under the circumstances stated. We have looked at the case solely in reference to the question of legal title. That title is shown to be in the tenants, they having, as judgment

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creditors, levied their execution upon the demanded premises, before the institution of the proceedings in insolvency; and the subsequent steps to perfect the levy being all duly taken by the judgment creditors, their title takes effect from the seizure on execution. This seizure gave the tenants a priority known and recognized by law, and which the legislature have not seen fit to vacate by any statute enactment. The assignee, therefore, acquired no title to the demanded premises by the deed of assignment from the master in chancery.

Demandant nonsuit.

James Dalton *vs.* James Savage & others.

E bequeathed all her shares or stock in two insurance offices to her sister M., to receive the interest or dividends thereof during M.'s life, and, at her decease, to S. and her children: S. then had two children, J. and G., and never had any others: E's executor received, from one of the insurance offices, $262·50, as a dividend of the capital stock thereof, and paid the same to M.: S. and G. died, and J. was administrator of their estates: J. assigned to D. all his right, title, property and claim in and to the shares bequeathed by E., and all his right, title, interest and property in and to any other stocks or estates in which the proceeds of said shares might be thereafter invested, and covenanted that he was the sole and lawful owner of said shares, subject to the right of M. to receive the income thereof during life, and that he would make such further assurance as should be requisite to perfect the intent of the assignment; neither D. nor J. then knowing that said $262·50 had been paid to M. as a dividend of capital: Afterwards, E.'s executor, though he had notice of said assignment, made an absolute conveyance of said shares to M., who bequeathed the same and other property to her executor, upon certain trusts: D. brought a bill in equity against M.'s executor, to compel him to assign said shares to D., and to pay him the dividends received after M.'s death, and also said sum of $262·50.

Held, that on the death of E., S. and her two children, J. and G., took a certain interest in the remainder bequeathed to them; that, whether this was vested or contingent, J., after the death of S. and G., became entitled to one third of the whole bequest to them, in his own right, and to two thirds, as administrator of their estates; and that he had a right to sell or transfer the same for his own benefit. *Held also*, that the $262·50 passed to D. by the assignment of J. *Held also*, that although the convey ance of the shares to M. by E.'s executor was a breach of trust, yet the legal title thereto passed to M. by the conveyance, and that she took them subject to a trust in favor of J., and that her executor was bound to assign them to D., and pay to D. all dividends received thereon after M.'s death, and also said sum of $262·50.

The plaintiff alleged, in a bill in equity, that Elizabeth Blanchard, by her last will, executed on the 18th of October 1817, and duly allowed and approved on the 13th of Septem-

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ber 1824, made the following bequest: "I give all my shares or stock in the New England Insurance Office, and Fire and Marine Insurance Office, in Boston, to my sister Mary Blanchard; that is to say, I give her the interest or dividends thereof, as they shall from time to time become due, for her to receive the same, so long as she shall live; and at her decease, I give said shares or stock to Mrs. Sarah Blanchard, wife of George Blanchard, and to her children: And I do appoint David W. Bradlee executor of this will:" That, at the time of said Elizabeth's decease, she was possessed of two shares of the stock of the New England Marine Insurance Company, of the par value of $100 each, and of twenty one shares of the stock of the Massachusetts Fire and Marine Insurance Company, of the par value of $50 each: That said Sarah Blanchard, at the time of said Elizabeth's decease, was living, a widow, with two children, viz. James T. Blanchard and George Blanchard: That said Sarah, in the year 1828, died intestate, and the said James T. was appointed administrator of her estate, and administered thereon: That said George was lost at sea, (but at what time is unknown,) and died intestate, and the said James T., in 1830, was appointed administrator of his estate, and administered thereon: That by virtue of the aforesaid bequest in the will of said Elizabeth, the said Sarah, James T. and George took a joint interest in said shares of stock, subject to the life interest of the said Mary, and contingent upon their surviving her; and that upon the decease of the said Sarah and George, the said James T. became entitled to the same, subject to the life interest of said Mary, and could lawfully assign his interest therein: That the said James T., on the 7th of September 1831, borrowed and received of the plaintiff $1000, and executed and delivered to him the following instrument: "I, James T. Blanchard, in consideration of $1000 paid me by James Dalton, do hereby sell, assign and transfer unto him all my right, title, property and claims, in and to those certain shares of the corporate stocks and estates of the New England Marine Insurance Company, and of the Massachusetts Fire and Ma-

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rine Insurance Company, formerly belonging to Elizabeth Blanchard, and the income whereof she bequeathed to Mary Blanchard, during her life, and which shares the said testatrix bequeathed, at the death of the said Mary, to belong to Sarah Blanchard and her children; the said Sarah being deceased, and I being her only surviving child; the said shares now standing or being in the name of the said Elizabeth or of David W. Bradlee, executor of the will of the said Elizabeth," &c. "And all my right, title, interest and property, in and to any other stocks or estates in which the proceeds of the said shares may be, at any time hereafter, invested. To hold the same to the said Dalton, his heirs, executors, administrators and assigns forever; but in trust, as collateral security for the payment of a promissory note, bearing even date herewith, signed by me, payable to my own order, and indorsed by me to the said Dalton, for said sum of $1000, on demand, with interest," &c. "And upon failure of payment of said note, at any time within ten days after demand made, then in trust to sell the said shares, or any other stocks or estates in which the proceeds thereof may be invested, and the proceeds of such sale to apply in and towards the payment of said note, and the surplus, if any, to pay to me, or my order in writing. And upon payment of said note, at any time before such sale, then in trust to re-transfer the same to me or my legal representatives. And, for the purposes aforesaid, I do hereby constitute the said Dalton, his executors, administrators and assigns, to be my lawful attorneys, irrevocable during the continuance of these trusts, to demand and receive from the said Bradlee, or his successor in said office of executor, the said shares and other stocks and estates, at the decease of the said Mary, in my name or otherwise, but to their sole use, upon the trusts aforesaid," &c. "And I do covenant that I am the sole and lawful owner of said shares, subject to the right of the said Mary to receive the income thereof during her life," &c., "and that I will, at any time or times, as often as thereto reasonably requested, execute and deliver to the said Dalton, his execu-

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tors, administrators and assigns, such further deeds, assurances, and letters of attorney, as may be requisite or expedient in order to perfect the intent of these presents. James T. Blanchard. (seal.)"

The plaintiff further alleged, in his bill, that said David W. Bradlee accepted the trusts and performed the duties of executor of the will of said Elizabeth; and that the plaintiff duly gave notice to him, on the 23d of July 1832, of the foregoing deed of assignment, by exhibiting the same to him: That said Bradlee continued to act as trustee under said will, and to pay the income and dividends of said shares to the said Mary, until his death, which was in November 1833: That, after the decease of said Bradlee, George Murdock was appointed administrator *de bonis non* of said Elizabeth, with her will annexed; and that, in March 1834, the existence of the foregoing deed of assignment was notified to said Murdock; but that he, without the knowledge or consent of the said James T., or of the plaintiff, afterwards made an absolute transfer of said shares to the said Mary Blanchard.

The plaintiff further alleged, in his bill, that said Mary did not, by the transfer aforesaid, become the absolute owner of said shares, but she thereafter held them in trust, for her own benefit during her life, and could not legally sell or transfer the same, nor dispose thereof by will; but that, upon her decease, the same would become the absolute property of the said James T. and his assigns: That divers sums of money, viz. the sum of $100 upon each share, were received by the said Mary, as dividends of *capital* upon said two shares in the New England Marine Insurance Company; and that the same were received and held by her upon the trusts last above mentioned: That while the said Bradlee, as executor as aforesaid, held the said twenty one shares of the stock of the Massachusetts Mutual Fire and Marine Insurance Company, the sum of $262·50 was paid to him as a dividend of *capital* therein, which sum he paid over to said Mary, before the execution of the said deed of assignment to the plaintiff.

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That when said deed of assignment was made, neither the plaintiff nor said James T. knew that payment of the sum last aforesaid had been made to said Mary, as a payment of a dividend of capital: That it was the intention of said James T. to assign to the plaintiff all his interest in said shares, or in any other estates or property in which the proceeds thereof were invested; and that the plaintiff is entitled to receive the same.

The bill further alleged that the said Mary died in May 1843, having made her last will, whereby, after bequests of certain specific articles of personal property, she appointed James Savage (one of the defendants) her executor, and made to him the following devise: "I devise the rest and residue of my estate, real, personal, or otherwise, to my executor, in trust, *first*, to pay the interest and income thereof to my nephew, James T. Blanchard, semi-annually, or more often, if he shall think proper, for and during his natural life; and I direct that my executor pay over to my said nephew one thousand dollars of the principal, if my said executor can well and safely insure the payment of the same into the hands of my said nephew, and not otherwise; the thousand dollars to be paid as soon as the same can well be done; *second*, at the decease of my nephew, James T. Blanchard, I give and bequeath what shall remain of said property devised in trust, to Henrietta Clark, Sarah L. Blanchard, and William B. Blanchard, or to such of them as shall then be living," &c.: That said will was duly approved and allowed, in June 1843, and that said Savage accepted said trust, and is now performing the same, and is in possession of the said shares of stock, and the sums of money received as dividends of capital thereof: That by reason of the facts above set forth, a trust has arisen, on the part of said Savage, executor as aforesaid, for the benefit of the plaintiff, to have said shares of stock transferred and said sums of money paid to him, to be disposed of according to said deed of assignment, and to be applied to the payment of said note, and the interest due thereon, and of the further sum of $150, which the plaintiff, upon the strength of said security

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lent and advanced to said James T. on the 21st of April 1832, to be repaid on demand with interest.

The bill concluded with a statement of the amount due to the plaintiff from said James T. Blanchard; an averment that said Savage had refused, though requested, to transfer said stock to the plaintiff, or to pay him the sums received by said Mary as dividends of capital; and a prayer that said Savage, said James T., and the other persons named in said Mary's will as her legatees, might make answers, and that said Savage might be directed to transfer to the plaintiff the said shares, and pay to him the said sums of money.

The defendant Savage filed an answer, admitting the matters in the bill, which are stated as facts. He also made the following statements: "After the decease of said Elizabeth, and before the execution of said contract by said James T. Blanchard, her executor received from said Massachusetts Fire and Marine Insurance Company $12·50 of the capital stock on each and every of the said twenty one shares. And the said shares, when transferred to said Mary, were of the par value of $37·50 each, and no more: That this respondent, as executor of said Mary, now holds said two shares in the New England Marine Insurance Company; but the said Mary, a short time before her decease, received from said company $200 upon said two shares, being in dividends of a portion of the capital stock of said company; and that the said shares are now of about the value of $7·50 each: That during the life time of the said Mary, the said Massachusetts Fire and Marine Insurance Company, being thereto legally authorized, received the certificates of shares in said company of the par value of $37·50 each, from the stockholders in said company, and issued certificates for new shares of $100 each; issuing certificates of three shares of $100 each, for every eight shares of $37·50 each. And the said Mary then surrendered her certificates for certain other shares, held by and belonging to her, in said company, and received certificates of shares, each of the par value of $100. And this respondent now holds eleven and seven eighth shares in the Massachusetts Fire

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and Marine Insurance Company, which are the fruits of the said twenty one shares; and he admits that the estate of said Mary, which has come to his hands, in addition to said shares, exceeds the sum of $262·50; being the amount received by said Mary from dividends of the capital on said two shares in the New England Marine Insurance Company, and the further sum of $262·50, which was the amount of the dividend of capital upon said shares in the Massachusetts Fire and Marine Insurance Company, received by said Bradlee."

The answer also admitted the receipt, by said Savage, of dividends on said shares in the Massachusetts Fire and Marine Insurance Company, before the filing of the bill.

The case was submitted to the court on the bill and the answer of said Savage.

The argument was had at the last March term.

F. C. Loring, for the plaintiff. Mary Blanchard took an interest in the insurance stock, for her life, remainder to Sarah Blanchard and her children. *Ellis* v. *Proprietors of Essex Merrimack Bridge*, 2 Pick. 243. Sarah and her children took a joint interest in the remainder. This interest was also *contingent*, till the death of Mary, and the contingency did not happen in the life time of Sarah or George. The joint interest, therefore, survived to James T., who became entitled to possession on the death of Mary. *Denny* v. *Allen*, 1 Pick. 147. *Emerson* v. *Cutler*, 14 Pick. 115. *Nash* v. *Cutler*, 16 Pick 496.

If Sarah, James T. and George took a *vested* interest in the bequest over, then James T., at the time of the assignment, had one third in his own right, and was entitled to the other two thirds, as representative and distributee of Sarah and George. And if the bequest over vested in Sarah alone, (rejecting the words "and her children," as inoperative,) James T., as one of her distributees, was entitled to a moiety of it, and, as the sole distributee of George, to the other moiety; and, as administrator on the estates of both, he held the legal interest, for his own benefit, and could lawfully assign it.

The assignment by James T. to the plaintiff is sufficiently

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comprehensive to embrace the $262·50, which was paid to Elizabeth's executor, and by him to Mary, as a dividend of capital, before the execution of the assignment. For it mentions the shares formerly belonging to Elizabeth, and by her bequeathed; evidently including the identical shares. And this sum of $262·50 was a part of the value of those shares, and a part of what was intended to be assigned.

The plaintiff is entitled to all the dividends of profits which have been made on the shares since the death of Mary; because, at her death, they became his property, and from that time her executor held them in trust for the plaintiff.

W. Gray, for the defendants. Sarah Blanchard, and her children living at the death of Elizabeth, took a *vested* remainder in the stock bequeathed to Mary for life; and such a remainder will open to let in children afterwards born. *Annable* v. *Patch*, 3 Pick. 360. If so, what passed by the assignment? The mother and brother of James T. died before the assignment was made, and he was administrator of both of their estates. But though he might ultimately be entitled to the property, as heir of his mother and brother, yet it must first go into his hands as administrator, and be regularly accounted for as part of their estates. And he could not, by his assignment, transfer the rights which belonged to their estates. *Non constat* that there are not creditors of both estates, who are entitled to the interest of the deceased in the insurance stock. Though the assignment might purport to carry the whole shares, yet it would pass only such interest therein as the assignor could legally convey. *Ellis* v. *Proprietors of Essex Merrimack Bridge*, 2 Pick. 243. On this view of the case, the plaintiff is not entitled to more than one third of the shares, as they were at the time of the assignment. The plaintiff cannot substantiate a claim to the $262·50; for the assignment was of shares, and of any other stocks or estates in which the proceeds of the said shares might be thereafter invested. This does not include money which had been previously paid as a part of the capital of the shares.

But if the remainder, bequeathed to Sarah and her children,

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was a *contingent* one, to vest in such of the legatees as should be alive at the death of Mary, was it the subject of a legal transfer? By the Rev. Sts. *c.* 60, § 30, "when any contingent remainder, executory devise, or other estate in expectancy, is so granted or limited to any person, that, in case of his death before the happening of the contingency, *the estate would descend to his heirs in fee simple*, such person may, before the happening of the contingency, sell, assign or devise the premises, subject to the contingency." Now, if this remainder be contingent, so that such only of the legatees as should survive Mary could take, then, if James T. had died before Mary, it would not have descended to his heirs, and would not come within the above provision of the revised statutes; and his interest would not be assignable. See *Hall* v. *Tufts*, 18 Pick. 455. *Rich* v. *Waters*, 22 Pick. 563.

Loring, in reply. A vested remainder in personal estate cannot open to let in after born children. *Dingley* v. *Dingley*, 5 Mass. 537. And it was not decided in *Annable* v. *Patch*, 3 Pick. 360, that the devisees took a vested remainder in the personal estate.

If James T. owned only one third in his own right, when he made the assignment, he was, in equity, owner of the other two thirds, and is estopped, by his deed, to set up that defence; as he covenanted that he was the lawful owner, and that he would make further assurances. Nor can the defendant Savage raise this objection.

The suggestion, that there may be creditors of Mary and George, who may be prejudiced, is of no force, unless they took a vested remainder, and died insolvent. Their insolvency is not shown nor suggested.

The clause cited from the Rev. Sts. *c.* 60, refers only to real estate, and is, therefore, of no force in this case.

In *Rich* v. *Waters*, cited for the defendants, it was held that a contingent remainder in personal estate is not *attachable*; but contingent interests and claims have been repeatedly decided to be *assignable*. *Crocker* v. *Whitney*, 10 Mass. 319. *Cutts* v. *Perkins*, 12 Mass. 206. *Gardner* v. *Hoeg*, 18 Pick. 170.

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WILDE, J. Since the arguments in this case were submitted to the court, the principal question here raised has been settled in the case of *Winslow* v. *Goodwin*, 7 Met. 363. It was there decided, that contingent interests, as well as vested interests, in real or personal property, pass to the personal representatives, according to the nature of such interests, so as to entitle such representatives to them when the contingency happens, if the party dies before the termination of the previous estate. This is fully established as the law of England, by numerous decisions; and such, it was decided, was the law of this Commonwealth, confirmed by *St.* 1805, *c.* 90, § 1, which was thus: "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, the same shall descend," &c. In § 2 there was a similar provision as to personal estate; and these provisions are reënacted in the Rev. Sts. *c.* 61, § 1, and *c.* 64, § 1. And it was decided that the statute extended to contingent as well as vested interests, in conformity with the principles of the common law.

Such contingent interests are also transmissible by devise, by our statute of devises, whether they are given by way of contingent remainder or by executory devise; and such is clearly the rule of the common law, unless, by the terms of the gift or devise, it is so limited that the devisee of the contingent interest is not to take the same if he be not living at the time when the prior estate terminates, or at some particular time. As, for instance, if the remainder had been given to Sarah Blanchard, and to her children living at the time of the decease of Mary Blanchard, such a contingent interest would not have been transmissible to an heir or devisee. In the present case, on the death of the testatrix, Sarah Blanchard and her two sons took a certain interest in the remainder bequeathed to them; and whether it was vested or contingent is not material.

Upon these principles, it is clear that James T. Blanchard

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after the death of his mother and brother, became entitled to the whole bequest to them. As the contingency ceased by the death of his mother, the remainder vested in him, one third in his own right, and two thirds as administrator of the estates of his mother and brother. And it is equally clear that he had a right to sell or transfer the same, as security, for his own use and benefit.

It is objected, that there may be creditors who might be prejudiced by such transfer. But this does not appear. And if there are creditors, they cannot be prejudiced; for the administrator and his bondsmen are liable, if the creditors' claims are not barred by the statute of limitations, or otherwise.

It is also objected, that the $262·50, which was paid out of the shares in the capital stock of the Massachusetts Fire and Marine Insurance Company, before the assignment to the plaintiff, could not pass thereby. But we are of opinion that this is not the true construction of the assignment. It transfers, in terms, all the assignor's right, title, property and claims, in and to the shares of stock formerly owned by Elizabeth Blanchard, and by her bequeathed to Mary Blanchard for life, and, on her decease, to Sarah Blanchard and her children; and also all his right, title, interest and property, in and to any other stock or estates, in which the proceeds of the said shares may be at any time thereafter invested. There is also a covenant that the shares had not been incumbered, and for further assurances. It appears that the assignor was ignorant, at the time of the assignment, that any part of the capital stock had been paid in. But it is manifest that the whole trust fund was intended to be assigned, whatever might be its condition. And so, we think, the assignment is to be construed. The plaintiff, therefore, is entitled to the whole trust fund, to hold the same as security, according to the terms of the assignment.

The transfer of these shares, by the executor of the trustee, to Mary Blanchard, was a breach of trust; but the legal title passed to her, and she took them subject to the trust. And her executor is bound by the same trust. He is therefore

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obligated to transfer to the plaintiff the shares he holds in trust, and to pay over to him the sums of money, received by Mary Blanchard as dividends of capital, and such dividends of profits as he has received since her decease; and a decree to that effect is to be entered.

St. Louis Perpetual Insurance Company *vs.* Sidney Homer.

A. borrowed money of an insurance company, and gave an unconditional promissory note therefor, payable in twelve months to the order of B., who, at the same time, indorsed it to the company for the accommodation of A. *Held*, in a suit on the note, brought by the company against B., that he could not give in evidence, by way of defence, an oral agreement between himself, the company and A., made when the note was given and indorsed, that such sum as should be found justly due from the company to A. on a certain policy of insurance made by them to him, should be set off and applied in or towards the satisfaction of the note. *Held also*, that B. could not set off, against the company's demand on the note, A.'s claims against the company on the policy of insurance.

Assumpsit on the following note, indorsed by the defendant to the plaintiffs: "Saint Louis, Mo. December 22 1838. Twelve months after date, we promise to pay to the order of Sidney Homer, negotiable and payable at the Bank of the State of Missouri, seven thousand five hundred and ninety-six $\frac{44}{100}$ dollars, for value received, without defalcation, with interest at the rate of six per cent. per annum.

J. & T. J. Homer."

The parties, for the purpose of obtaining the opinion of the court on a preliminary question in the case, agreed on these facts: "The defendant indorsed the said note, at the time it was made, for the accommodation of the makers, and with the knowledge of the plaintiffs, and under the agreement hereinafter set forth. The plaintiffs were underwriters on a policy of insurance on merchandize belonging to the makers, for an amount exceeding the amount of the said note, payable, in case of loss, to the said makers; and at the time the said note was made, a total loss had happened, which the said makers averred, and the plaintiffs denied, was a loss

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within the policy. The note was given for the sum therein mentioned, lent by the plaintiffs to the said makers; and at the same time it was given, it was agreed between all the parties, that whatsoever sum, if any, should be found to be justly due under the said policy, should be set off and applied in or towards satisfaction of the said note. No action on the policy has ever been brought.

"If, in point of law, the defendant can be allowed to prove this agreement, and to show, in this action, what, if any thing, is due under the said policy, then this statement of facts is to be discharged, and the action is to stand open for trial on the facts, as if this agreement had not been made. If the court shall be of opinion that the defendant cannot go into this defence, then the action is to stand for trial on the general issue, and the plaintiffs are to make proof of the facts necessary to charge the indorser."

The argument was had at the last March term.

B. R. Curtis, for the plaintiffs.

Bartlett, for the defendant.

Dewey, J. 1. The proposed evidence is clearly inadmissible, being, as it seems to us, in direct violation of well settled principles regulating the admission of evidence. The note is perfect and complete in itself, and is an absolute contract for the payment of a certain sum of money. This contract the defendant would control by evidence of a verbal agreement, made concurrently with the written contract, affecting the nature of the promise, engrafting upon it a new stipulation, by which the parties agree that this absolute promise shall be in truth a conditional one; and in lieu of the promise to pay the sum stipulated in the note, the defendant proposes to show that any sum which might be found justly due on account of a claim which the makers of the note had against the plaintiffs, upon a certain policy of insurance given by the plaintiffs, should be deducted therefrom, and applied in or towards satisfaction of said note.

The general principle, that oral testimony is inadmissible to contradict, vary or explain a written contract, is too famil-

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ur to require the citation of authorities. There are, however, two cases adjudicated in this court, so directly in point, that I will briefly refer to them. In *Hunt* v. *Adams*, 7 Mass. 518, which was assumpsit on a promissory note, the defendant, in defence of the action, offered to prove that, at the time he executed the note, it was agreed by the payee that Adams should not be called upon until an attempt had been made to obtain payment of the same of Chaplin, the real principal in the note. But such evidence was holden inadmissible, and was rejected. So in the case of *Wakefield* v. *Stedman*, 12 Pick. 562, which was an action upon a written promise to keep safely, and deliver on demand, certain articles attached by the plaintiff as a deputy sheriff, parol evidence was offered to show that, at the time of executing this contract, it was agreed by the plaintiff that he would, at any time, on receiving notice from the defendant that he was dissatisfied and wished to be discharged, receive the property for which the receipt was given, and discharge the same, and that the defendant gave such notice to the plaintiff. But it was held, that as the written promise was absolute, parol evidence was inadmissible to control or vary it.

These cases seem to be directly in point, and would require us to exclude this species of evidence, if offered by the makers of the note in a suit between them and the payee, where the defence would arise between the original parties. And this is the most favorable position in which the defendant can put the case.

2. No valid defence to the note being shown, the next inquiry is, whether the defendant can avail himself of the claim of the makers of the note for damages arising upon a policy of insurance, by way of set-off, under our statute of set-off — Rev. Sts. *c.* 96. In presenting this claim in set-off, the defendant is met with two objections. 1st. He has no claim to set-off in his own right. The demand, which is proposed to be set off, is in favor of the makers of the note. It is a litigated claim. If the result of an investigation and trial of that demand, in the present action, be unfavorable to the

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makers of the note, who are the parties claiming damages under the policy of insurance, they are not barred by the verdict and judgment rendered in the present action. The interest of the defendant in that demand, and his connexion with it, are not such that, independently of the parol evidence, he can avail himself of it for any purpose. He could not, as indorser, offer this demand as a set-off. Nor do we perceive that the circumstance, that the defendant is an accommodation indorser, can affect this question of set-off, under the statute. 2d. But independently of the objection, that this demand in set-off is claimed as due to the makers of the note, and not to the defendant, who is the indorser, there exists the broader objection, that the claim for damages, upon a policy of insurance, for an alleged loss, when the claim is denied by the insurers, and the legality of such claim is undecided, and the amount of damages wholly unliquidated, is not embraced in the statute of set-off, and, for this reason, would be excluded.

Looking at the case, therefore, in any aspect, the proposed defence, either to the action on the note, or as a set-off, cannot avail the defendant.

Thomas Richardson *vs.* The Boston Chemical Laboratory

One incorporated manufacturing company recovered judgment against another, and took out execution for £2868·93, and afterwards voted that the whole affair relative to said judgment should be left with the directors, with full power to compromise and settle the same in such manner as they should deem expedient: The directors voted that they would receive £1661·35 from the debtor corporation in full satisfaction of the execution, and would receive the notes of the individual members of that corporation, for said sum, payable one half in six months and one half in nine months, with interest, and that the execution should remain in the hands of the treasurer of the creditors, as security for the payment of said notes: Afterwards, R. and other members of the debtor corporation gave their several notes, amounting in the whole to £1661·35, payable in six and nine months from the day on which said directors' vote was passed, and said treasurer signed an instrument acknowledging the receipt of the notes, and agreeing, when they should be paid, if paid when due, to cancel said execution, or transfer it to the makers of said notes, as they should direct: No payment was made on the notes: The creditor corporation, one year after the date of the

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notes, voted that their treasurer inform the debtor corporation that the compromise aforesaid was no longer considered binding, and that the creditor corporation should look for payment on the execution, and was ready to give up said notes; and this notice was duly given by said treasurer. Afterwards, the creditor corporation sued out a pluries execution, and committed R. to prison thereon; and he brought a writ of *audita querela*, to be relieved from imprisonment. *Held*, that the respective obligations of the parties were to be determined by the terms of instrument signed by said treasurer; that payment of the notes, as they became payable, was a condition precedent to the discharge of the execution; that the failure so to pay the notes justified the creditor corporation in refusing to discharge the execution, and warranted the commitment of R. to prison.

A tender is not valid, if it be accompanied with a demand of a discharge of the party by whom or for whom the money is tendered.

This was a writ of *audita querela*, dated January 10th 1842, in which the plaintiff averred that, on the first Tuesday of March 1839, the defendants (a corporation established by *St.* 1835, *c.* 40,) recovered judgment against the South Boston India Rubber Company, (a corporation established by *St.* 1835, *c.* 55,) for $2868·93, debts and costs, and took out execution thereon: That on the 3d of June 1840, the defendants, by their directors, in consideration that the said India Rubber Company would forbear to prosecute a writ of review of said judgment, then pending, agreed with the said company to receive $1661·35 in full satisfaction of said execution, and to receive the promissory notes of individuals of the said company for said sum, payable one half in six, and one half in nine months from said date, with interest, and that the execution should remain in the hands of the treasurer of the Chemical Laboratory, (the present defendants,) as security for the payment of said notes: That afterwards, on the same day, certain of the stockholders of said India Rubber Company, among whom was the plaintiff, severally made and delivered their notes to the treasurer of said Chemical Laboratory, to the amount and in form as aforesaid, payable to said Chemical Laboratory, or order: That the said India Rubber Company did forbear to prosecute their petition for a review, and that the same was withdrawn: That on the 12th of October 1841, the defendants, by virtue of a pluries execution issued on the judgment aforesaid, pursuant to the statute, levied the same on the body of the plaintiff, as one of the

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stockholders of said India Rubber Company, and that he gave bond for the liberty of the prison limits: That afterwards, on the 10th of January 1842, the plaintiff tendered to the defendants the principal and interest of all the said notes, and all legal costs and charges up to that time, and demanded that the execution should be discharged; which the defendants refused; and that the defendants still unjustly restrain the plaintiff of his liberty.

Trial before *Wilde*, J. whose report thereof was as follows: The plaintiff, to maintain the issue on his part, put in the judgment and execution, and the petition for review mentioned in his writ, and also the record showing that said petition was disposed of by the entry of "neither party." He also called one of the jurors who tried the cause in which said judgment was rendered, whose testimony tended to show that the books of the defendants, except the memorandum book at the factory, were not produced at the trial, and that he (the juror) afterwards, when he became a director of that company, saw in said books an entry of $500, which he thought was not shown at the trial; but of this he was not very certain. This testimony, together with the other evidence on this point, the defendants were prepared to contradict and explain; but the ruling of the court, hereinafter stated, rendered the same unnecessary. The plaintiff then put in the following vote, as taken from the records of the defendants, dated May 4th 1840: "Voted, that the whole affair relative to the judgment, which this company holds against the South Boston India Rubber Company, be left with the directors of this company, with full power to compromise or to submit the same to arbitration, and to settle the same in such manner as they shall deem expedient." Also the following vote, taken from the records of the defendants' directors, dated June 3d 1840: "Voted, that in conformity to instructions of stockholders, we will receive the sum of sixteen hundred and sixty one $\frac{33}{100}$ dollars from the South Boston India Rubber Company, in full satisfaction for the execution of two thousand, eight hundred and sixty eight $\frac{33}{100}$ dollars,

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held by the Boston Chemical Laboratory against the South Boston India Rubber Company; and that we receive the notes of individuals of that company for said amount of sixteen hundred and sixty one $\frac{35}{100}$ dollars, one half of which shall be payable in six, and the other half in nine months, with interest from this date; and that said execution remain in the hands of the treasurer of this company as security for the payment of said notes."

The plaintiff then put in the following paper: "Boston, June 3d 1840. Received of Josiah Dunham his two notes for two hundred and fifty dollars each, one payable in six months and the other in nine months from date hereof; also two notes of Thomas Richardson, of one hundred and seventy five dollars each, one payable in six and the other in nine months from date hereof; also two notes of Ebenezer Stevens, of one hundred and seventy five dollars each, one payable in six and the other in nine months; also two notes of J. Dunham, Jr. of seventy five dollars each, one payable in six and the other in nine months; also Wm. H. Howard's two notes for one hundred and five $\frac{67}{100}$ dollars each, one payable in six and the other in nine months; also H. Montgomery's two notes of fifty dollars each, one payable in six months and the other in nine months. Said notes are all on interest, and when the same are paid, I hereby agree (if the same are paid when due) to cancel or to transfer the execution which the Boston Chemical Laboratory now hold against the South Boston India Rubber Company to the abovenamed persons, as they shall direct. H. Montgomery, Treasurer Boston Chemical Laboratory."

The plaintiff then called a witness to prove the alleged tender, who testified that, on the 10th of January 1842, he went with the plaintiff to Montgomery, and asked him if he was treasurer of the defendants, and that he replied that he was; and that thereupon the witness offered him the amount, (which it is agreed was as it is stated in the plaintiff's writ,) and said to him, "we want Richardson's discharge from that execution." Montgomery said he could not

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do it, and referred the witness and the plaintiff to three persons, as having charge of it, as a committee; of whom he said J. Dunham, sen. was chairman: That the witness went to said Dunham, and tendered the money to him, and told him the same about the discharge of the execution that he had told to Montgomery; and that said Dunham refused, and said he could not do it: That said Dunham went with the witness to Montgomery's office, (the plaintiff not being present,) and there found Ebenezer Stevens and others, (whom the witness thought to be connected with the Chemical Laboratory,) and had further conversation: That at the former interview at Montgomery's office, Montgomery said he was aware of the execution and of "that agreement," but that it was all done with, and that the notes were given up: That the plaintiff said, in reply, "no, not mine:" That towards the end of the conversation, Montgomery offered the plaintiff his notes and that he declined taking them: That Montgomery said "you might have had them, as you had notice of them:' That the plaintiff said he had not had notice; and that Montgomery then got them and laid them on the table: That the plaintiff consulted the witness and refused them: That the witness then made the tender to one of the attorneys of record in the suit in which the judgment of the defendants was recovered, and he refused it.

On cross-examination, the witness stated that he had the treasurer's receipt (above set forth) in his hand, when he went to make the tender, and should not have given the money to Montgomery, unless he had given him back something wherewith he could have obtained Richardson's discharge: That he said to Montgomery, "here is the money I suppose to be due, and I want Richardson's discharge;" but did not think he told him he should not pay unless Richardson were discharged: That Montgomery said he had no doubt the money was right as to amount, but he could not do it: That when the witness offered the money to Dunham, he stated what it was, and what it was for, but said nothing about a discharge.

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The defendants put in their vote, passed on the 3d of May 1841, as follows: "Voted, that the treasurer of this company be directed to inform the South Boston India Rubber Company, that the compromise made between this company and said India Rubber Company, in relation to an execution held against said India Rubber Company, is no longer considered binding, and we shall look for payment on the execution; and we are ready to give up certain notes, which were given by certain individuals, which, if they had been paid when due, would have cancelled the execution." And H. Montgomery, the defendants' treasurer, testified that the direction given in this vote was complied with.

The defendants also put in the following vote of the South Boston India Rubber Company, passed on the 13th of July 1841: "Voted, that the committee chosen at a previous meeting, consisting of Messrs. Montgomery, Howard and Dunham, jr., be and are hereby authorized to proceed immediately to sell all real estate of this company, (by auction,) and to apply the moneys arising from said sale to the payment of the debt due from this company to the Boston Chemical Laboratory; also the debt due from this company to Cyrus Alger; and also to the payment of other debts due from this company." Also the following vote of said India Rubber Company, passed May 30th 1840: "Voted, that this company accept the proposal of the following persons to loan to this company their notes or money, the following sums, to wit: Josiah Dunham, five hundred dollars; Wm. H. Howard, five hundred dollars; T. Richardson, three hundred and fifty dollars; E. Stevens, three hundred and fifty dollars; H. Montgomery, two hundred dollars; J. Dunham, jr. one hundred and fifty dollars; and that said loans be cancelled, within six months from this time, from the proceeds of the sales of real or personal estate of this company." And H. Montgomery testified that the notes referred to in this vote were contemplated to be given, part for the payment of the defendants, and part for another purpose. It appeared that the notes were not paid at maturity, but were surrendered

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to the parties giving the same, except that of the plaintiff, which the defendants offered to prove was tendered to him soon after maturity; but, for the purposes of the trial, the same was not admitted as part of the evidence. Upon this evidence, the defendants contended that this suit could not be maintained; and further, that the tender was insufficient. And the court being inclined to the opinion that the tender was insufficient, but that the plaintiff could not, upon the other evidence, recover, the case was taken from the jury.

If the whole court shall be of opinion that the plaintiff is not by law, on this evidence, entitled to recover, a verdict is to be entered for the defendants; otherwise, a new trial is to be ordered.

The argument was had at the last March term.

Dexter & G. W. Phillips, for the plaintiff. The vote of June 3d 1840, passed by the defendants' directors, and not their treasurer's receipt of that date, constituted the contract between the two corporations. That contract was not conditional, but absolute, and was virtually acknowledged by the defendants to be such, by their vote to vacate it, passed in May 1841. This vote is also an answer to the objection which the defendants may interpose, that the vote of their directors was not a contract, but only a proposition, and that they never ratified the compromise. Payment of the notes at maturity was not a condition of the discharge of the execution. If any contract was made by the treasurer's receipt, it was not a contract between the defendants and any other party; for he had no authority to make such contract. Com. Dig. Attorney, C. 12, 13. Story on Agency, §§ 99, 166 Angell & Ames on Corp. (2d ed.) 243, 245. *Warner* v. *Howell*. 3 Wash. C. C. 12. *Bank of the Metropolis* v. *Jones*, 8 Pet. 12. Or if the receipt be held to constitute a second contract of the defendants, yet the plaintiff may hold them to the contract under the vote; that being least beneficial to them. *Munn* v. *Baker*, 2 Stark. R. 255.

The execution was to stand as collateral security for the notes. The notes, therefore, were the real debt, and the

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execution could not be used until the notes became payable, and then only to enforce payment of the amount of the notes.

The plaintiff does not stand as one who took a receipt individually, but is entitled to all which the India Rubber Company gained or had a right to have.

The tender made to the attorney of record in the original suit was sufficient. He was, at least, the agent of the defendants. 3 Stephens Nisi Prius, 2600, 2601. This tender was made unconditionally. And the tender to Montgomery, the treasurer, was not made on such a condition as rendered it invalid. The reason of the rule, that a demand of a receipt in full, as the condition of a tender, makes the tender ineffectual, is that such a receipt would be an acknowledgment that the party has no other claim. But in the present case the party had the plaintiff in execution; and he could be discharged only by payment, or by the poor debtors' oath, or by some discharge. Tender of part would not, of itself, have discharged the execution, nor authorized the officer to surcease proceedings on it.

Bartlett & Homer, for the defendants. The receipt given by the treasurer qualified the more general terms of the vote of June 3d; and the vote and receipt together made the contract, if any was made. *Heywood* v. *Perrin*, 10 Pick. 228. *Barnard* v. *Cushing*, 4 Met. 230. The vote of the India Rubber Company, in July 1841, after the notes were given up, to provide for their debt to the defendants, shows that the company regarded the compromise as conditional. If any contract was made between the two corporations, it was a contract of composition, which must be strictly executed, in order to discharge the debtors. *Tufts* v. *Kidder*, 8 Pick. 537. *Upham* v. *Smith*, 7 Mass. 265. *Makepeace* v. *Harvard College*, 10 Pick. 298. *Mackenzie* v. *Mackenzie*, 16 Ves. 372. *Sewell* v. *Musson*, 1 Vern. 210.

If the vote and receipt did not constitute a contract, then there was only an offer of the defendants to accept part payment, which offer was never accepted and conformed to. Pay-

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ment of part, on an agreement to receive it in full, is no satisfaction, unless a release is given; there being no consideration for such agreement. *Cumber* v. *Wane*, 1 Stra. 426. *Wildes* v. *Fessenden*, 4 Met. 12.

The tenders of a part to the defendants' attorney and to Dunham were of no avail. *Lewis* v. *Gamage*, 1 Pick. 347. And the tender to the treasurer was insufficient, because it was accompanied by a demand of a discharge. 3 Stephens Nisi Prius, 2603, and cases there cited.

DEWEY, J. The first inquiry that arises upon this report is as to the terms of the contract entered into by the parties, on the 3d of June 1840; the plaintiff insisting that it was an absolute and unqualified agreement, by the defendants, to accept certain promissory notes, for the sum of $1661·35, in full of their judgment, subject to no other condition, than that the execution, which issued on such judgment, might be used for the limited purpose of enforcing payment of the sum secured by these notes. To sustain this position, the plaintiff relies upon the vote of the defendants authorizing their directors to adjust the demand against the plaintiff, at their discretion, and the vote of the directors, under that authority. This vote, the plaintiff insists, is to be taken as the evidence of the terms of the contract between these parties. On the other hand, the defendants contend that the only contract ever entered into between the parties was that contained in the written instrument signed by their treasurer.

If the position of these parties had been reversed, the plaintiff claiming under the written contract, signed by the treasurer, and the defendants insisting that they were bound only by the vote of the directors, and alleging a want of authority in the treasurer to execute a contract in the terms in which it was made, the question would perhaps have presented more difficulty. But, as the question now presents itself, the plaintiff would repudiate the written contract which he himself received from the treasurer, as the evidence of the stipulation between the parties, as to this matter. It seems to us, however, that although the vote of June 3d 1840 is to be looked

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to as the source of authority for the treasurer, yet that, under that vote, if the treasurer could close a more favorable arrangement, and one giving better security to the corporation, it was competent for the directors, or the company, to ratify such contract, so entered into between the treasurer and the plaintiff, and thus give it full force and effect. The vote of the directors, of June 3d 1840, is to be taken only as a proposition, not binding upon the party making it, until accepted or acted upon by the other party. The contract is complete only when the minds of both parties meet, and it is their agreement, thus assented to, which binds the parties. The plaintiff was willing to deliver over the notes upon the terms stated in the contract executed by the treasurer. The defendants assented to and adopted that contract. It then became the expositor of the arrangement made between the parties, and their respective obligations are to be determined by the terms of this instrument. It is conceded that this agreement, in the terms on which it was made with the treasurer, was not performed on the part of the plaintiff; the notes not being paid as they became due and payable. The condition of the promise contained in the writing executed by the treasurer — which was a condition precedent, upon which the execution against the plaintiff was to be discharged — was, therefore, not performed; and, by reason of this failure on the part of the plaintiff, it was competent for the defendants to refuse to carry into effect the further stipulation, by which the plaintiff would have been discharged from the execution on which he stood committed at the time of suing out his writ of *audita querela.*

This view of the case is decisive of the present action, and requires judgment to be rendered in favor of the defendants.

Another ground of defence was also relied on, which would, as it seems to us, lead to the like result. Supposing the proper construction of the contract between the parties to be such, that upon the payment of $1665·35, the execution was to be discharged, and that the time of payment was not limited strictly to the precise days on which the notes fell due;

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yet it was the duty of the plaintiff to make such payment before he could claim the benefit of it, or demand a discharge from the execution. No actual payment was ever made of this sum; but the plaintiff insists that a tender was made of that amount, which was refused by the defendants. It is denied, by the defendants, that any legal tender was made. It is said that, in order to be such, it must be an unconditional offer of the money; and if accompanied by any qualifying words, or with a demand of any thing to be done by the party to whom the tender is made, beyond the mere receipt of the money tendered, it will avoid the tender. Such seems to be the rule established by numerous authorities, in this Commonwealth and elsewhere. *Thayer* v. *Brackett*, 12 Mass. 450 *Loring* v. *Cooke*, 3 Pick. 48. *Wood* v. *Hitchcock*, 20 Wend. 47. *Brooklyn Bank* v. *De Grauw*, 23 Wend. 342. *Griffith* v. *Hodges*, 1 Car. & P. 419. *Peacock* v. *Dickerson*, 2 Car. & P. 51, *note*. *Strong* v. *Harvey*, 3 Bing. 304. *Ryder* v. *Townsend*, 7 Dowl. & Ryl. 119. *Glasscott* v. *Day*, 5 Esp. R. 48. *Higham* v. *Baddely*, Gow, 213.

The present case shows no unconditional offer to the defendants' treasurer of the sum to be paid; but it was accompanied with a requisition of some writing to discharge Richardson. This condition the plaintiff could not legally annex to the tender of the money, and this would clearly render that tender of no effect. As to the other tenders the court express no opinion.

A verdict is to be taken for the defendants, agreeably to the stipulation of the parties.

THOMAS G. ATKINS *vs.* GARDNER CHILSON.

A. demised to C., for eleven years, a store bounded on vacant land of S., "excepting and reserving unto said A. the right to stop up and build against the five windows in said store, which front upon" S.'s land, "and also to build against and put timbers into the wall on the side of said store in which the said five windows are at his pleasure," and C. covenanted to pay the rent, to keep the demised premises in such repair as they were in at the commencement of the term, and that "no

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alterations or additions in or to the same" should be made, during the term, without A.'s written consent: There was also a provision in the lease, that if C. shouk neglect or fail to perform or observe any of the above covenants, A. might lawfully, and without further notice or demand, enter into and upon the demised premises, and repossess the same, as of his former estate: C. afterwards took a lease from S. of said vacant land, for fifteen years, terminable by himself in ten years, and erected a building thereon, in contact with the wall of the store in which said five windows were: A. subsequently entered upon the demised premises, and gave C. written notice that he had "entered for breach of the covenant against making alterations in the said premises, pursuant to the right of entry reserved in the lease," and then brought a writ of entry against C. to recover possession of the premises. *Held*, that C. had not, by thus erecting the building on S.'s lot, broken his covenant that no alteration should be made in the demised premises. *Held also*, that A., by giving notice to C. that he had entered for breach of the covenant not to make alterations, was restricted to the breach thus alleged, and could not maintain his writ of entry by showing that C. had broken his covenant to keep the demised premises in repair.

WRIT OF ENTRY dated July 28th 1842, to recover possession of a parcel of land, with a store thereon, situate in Blackstone Street, in Boston. Trial before *Wilde*, J. who made the following report thereof:

The tenant claimed to hold the demanded premises under a lease from the demandant, dated November 30th 1841, for eleven years from the 1st of January 1842. The demandant admitted the lease, but claimed the premises by virtue of an entry made by him, on the 16th of July 1842, for a breach, by the tenant, of the condition of the lease. The lease thus described the premises demised: "All that four story brick store, not now numbered, being on the estate which I purchased of the administrator of John K. Simpson, late of said Boston, deceased." After excepting and reserving to the demandant the right to use a pigeon house on the premises, the lease continued as follows: "Also excepting and reserving unto the said Atkins, his representatives and assigns, the right to stop up, and build upon and against the five windows in the said store, which front and look upon or towards Ann Street, in said Boston, and also to build against and put timbers into the wall on the side of the store, in which the said five windows are, at his and their pleasure, during said lease, upon the express condition, that said Chilson, and his representatives, and those who may hold under him, do and shall

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make all repairs on said store and its appurtenances hereby demised, which may be necessary during the term of this lease, at his and their own expense, and without charge to said Atkins and those holding, or who may hold, under him; fire and unavoidable casualty excepted."

The tenant covenanted, in said lease, that he would pay rent and taxes, and would keep the premises in such repair as they were in at the commencement of the term, or might be put in by said Atkins or his representatives, during the continuance of the term, reasonable use and wear thereof, and damage by accidental fire, or other inevitable accident, excepted. The lease also contained the following covenant of the tenant: "And the said Chilson further covenants and agrees to and with the said Atkins, his heirs and assigns, that no alterations or additions shall be made, during the term aforesaid, in or to the same, without the consent of the said lessor, or of those having his estate in the premises, being first obtained in writing allowing thereof."

After some other covenants, the lease proceeded thus: "Provided, always, and these presents are upon these conditions, that if the said lessee, or his representatives or assigns, do or shall neglect or fail to perform and observe any or either of the above covenants hereinbefore contained, which on his or their part are to be performed, then, and in either of said cases the said lessor, or those having his estate in the premises, lawfully may, immediately or any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same, as of his or their former estate."

The demandant offered evidence to prove the following facts, which were not disputed by the tenant: The said Atkins, in 1840, purchased the land on which the store described in the lease was erected. There was then standing on the land, but not covering the whole of it, an ancient brick dwelling-house, the front of which was on Centre Street. In the eastern side wall of said house were five ancient windows,

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receiving light and air over the adjoining land, belonging now or formerly to Sybilla Stodder and others. There was also an ancient wooden conductor (gutter) attached to said wall by iron dogs, and extending from the front to the rear of the house, which was used for the purpose of conveying water from the roof to a cistern in the yard. The conductor, over Stodder's land, was about eight inches from the wall, and was, at the highest point, about nineteen feet above the level of the sidewalk in Centre Street. The demandant, in 1841, took down said dwelling-house, and erected the said store, which covers the whole of the land from Centre Street to Blackstone Street. He preserved the old wall in which the five windows were, and put new glazed sashes into them. Two of said windows had blinds at that time, and the others, except one in the attic, had the remains of old hinges fixed in or to the casings. There were also turn-buttons to some of them, inserted in the brick wall. The demandant took down the conductor, and had it repainted and refastened to the wall. He also removed the cistern, which was formerly in the yard, and the trunks which conveyed water into the conductor. He affixed swinging shutters, plated with iron, to all said windows.

This was the condition of the demanded premises, when they were leased to the tenant.

After the execution of the lease aforesaid, the tenant acquired possession of the Stodder land, under a lease from the owners, for fifteen years, terminable by himself in ten years, and erected a brick store thereon, three stories in height. The walls of it, fronting on Blackstone and Centre Streets, came close up to the walls of the demandant's store. The conductor and some of the turn-buttons of the windows were knocked down, or removed from their places, in the night time, and were found on one of the floors of the tenant's building, early in the morning, where they still remain. It did not appear by whom they were removed, nor whether the turn-buttons, which were knocked off, came from either of the two windows which had blinds on them when the demandant pur-

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chased the house. The demandant gave notice to the tenant, July 11th 1842, to replace the conductor and turn-buttons. The tenant had given orders to his builder not to remove the conductor; and the builder testified that he had intended to put a casing round it. He informed the tenant that the conductor was removed, and the tenant went and viewed it, and said that as long as it was down, he (the builder) might run the partition snug up against the demandant's wall. The partition was thereupon so placed, and now remains unaltered; and the conductor and turn-buttons have not been replaced. The tenant's partition is wood and plaster. The studs stand upright against the wall where the aforesaid five windows are; the tenant's wall, of which they are part, prevents the shutters from being opened; and the said lights are entirely closed and darkened. The studs and partition pass through and occupy the space which the conductor formerly occupied.

On the 16th of July 1842, the demandant made an open and peaceable entry into the premises demised to the tenant, and delivered to him the following writing: "To Gardner Chilson. Sir: Take notice I have entered on the premises described in the indenture of lease between you and myself, bearing date December 30th 1841, and taken possession thereof for breach of the covenant against making alterations in the said premises, pursuant to the right of entry reserved to me in the said lease. 16th July 1842. Thomas G. Atkins."

The evidence introduced by the demandant tended to show, that when he took down the dwelling-house and erected the store, he replaced the conductor in the same position from which he had taken it, except that it was pushed back a few inches from Centre Street. The tenant did not admit that it had been replaced in its original position; and he introduced evidence to show that it was placed seven or eight feet higher on the wall. The demandant's evidence tended to show, that while he was negotiating with the tenant for a lease of store, the tenant attempted to obtain the control of the easements claimed by the demandant on account of said windows, and offered the demandant the sum of $100 a year for them dur-

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ing the term of his lease; which the demandant refused to accept.

The tenant introduced evidence tending to prove the following facts: That the store was of an entirely different construction from the house that was taken down, and was intended and used for a different purpose; that the stories were much higher than those of the house; that the apartments of the store did not correspond with the apartments of the house, in any respect; that the store had no partition between Blackstone Street and Centre Street, in any story; that it was extremely well lighted, in all the stories, by the windows on the streets — having, on the lower story, on Blackstone Street, two large glazed doors and two windows, and four large windows in each of the other stories; that the five side windows, before mentioned, were not needed for the purpose of supplying the store with light and air; that four of them were so situated as to be inconvenient in using — the lower one being divided by the floor between two stories, and three others, which were small, being so near the ceiling of the second story of the store as not to be reached without a ladder; and that only one window, which came in the third story of the store, could be conveniently used; that these five windows never had been used in the store, and that the shutters had always been kept closed; that the tenant, who was the first person that occupied the store, had put shelves across all the windows, except the lower one; that before the time of the demandant's entry aforesaid, several studs had been placed in the wall of the building erected by the tenant, and with his consent, which passed through the space previously occupied by the conductor; that when the demandant made his entry, only so many studs had been put in as were necessary to support the timber over them, (because the contractor, who erected the tenant's building, did not know but that the conductor would be replaced,) and that the full number of studs which were required was not put in till after the demandant's entry; that at the time of said entry the conductor might have been replaced by an hour's work, and that it

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might now be replaced by two or three hours' work, without injury to the tenant's building; that the conductor was not used in conveying water for the store, and was not connected with any thing at either end; that the cistern to which it formerly gave water was carried away when the demandant's store was built, and that the space which it occupied came into the cellar of said store; and that the water from the roof of the store was never used, but was conveyed, by gutters and spouts, into the street on each front.

A suit in equity was brought by the demandant, against the tenant, before the demandant's entry, in which he sought, at first, to restrain the tenant from erecting his building, and now seeks to compel the tenant to remove his building, so far as to uncover the five windows in the demandant's store; which suit is still pending before this court. [See 7 Met. 398.]

The tenant also introduced evidence tending to show that he had directed the contractor, who erected his building, not to cut into or injure the wall of the demandant's store, and to case up the conductor without removing it, and that the contractor had made preparations for casing it up, previously to its being knocked down; and that neither the tenant nor the contractor derived any benefit from its removal, except that the tenant's store was made so much wider.

The tenant also introduced evidence tending to show, that the aforesaid five windows had never been used in the store, and that they could not be of any use in it; and that the demandant did not intend to use them for supplying light and air to the store. One of the tenant's witnesses testified that the demandant had said that he should preserve enough of the old wall to prevent the Stodders from building on their land; that he was going to shut up the windows, and that the Stodders could not build upon their land, nor sell it, and that it would be worth only a trifle.

The tenant also introduced evidence tending to show that the conductor was of no use, and could be of none, to the store, and that the demandant had no intention of ever using it for the purpose of conveying water for the use of his store but preserved it, as he said, merely to claim a right.

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The case was then taken from the jury by consent, the judge thinking that no fact, material to the decision, was in dispute. And the parties agreed that the whole court might direct a nonsuit or default, or order a new trial for the purpose of deciding upon any facts in dispute between the parties, which the court might deem material.

C. P. Curtis, for the demandant. The easements, which the demandant had in the Stodder land, increased the value of his own estate, and diminished the value of the servient estate. Gale & Whatley on Easements, (Amer. ed.) 6. And he has not abandoned those easements by altering his building, inasmuch as he expressly denied his intention to abandon them. *Moore* v. *Rawson*, 3 Barn. & Cres. 336. *Dana* v. *Valentine*, 5 Met. 13.

The tenant has broken his covenant to keep the demised premises in repair, and also his covenant that no alterations should be made in the same during the term. These breaches he has committed, by building on the Stodder lot so as to close the five windows, and by removing the conductor, (or availing himself of its removal by others,) and not replacing it. Comyn Land. & Ten. 189, 190. *Doe* v. *Jackson*, and *Penry* v. *Brown*, 2 Stark. R. 293, 403. *Monk* v. *Noyes*, 1 Car. & P. 265. Platt on Covenants, 285. *Duke of St. Albans* v. *Ellis*, 16 East, 352. *Roe* v. *Sales*, 1 M. & S. 297. *Jackson* v. *Brownell*, 1 Johns. 267. *Jackson* v. *Rich*, 7 Johns. 194. And the demandant has entered, pursuant to the terms of the demise, whilst the tenant's default continued, and has repossessed himself of his former estate. The right to insert these terms in the demise is unquestionable. A landlord, having the *jus disponendi*, may annex such conditions to his grant as he pleases, provided they be not illegal or unreasonable. *Cromwel's case*, 2 Co. 71 *b*. *Roe* v. *Galliers*, 2 T. R. 137. Comyn Land. & Ten. 98, 217, 221.

The form of the notice, given to the tenant by the demandant, on the 16th July 1842, is immaterial, as the lease provided that an entry might be made without notice or demand. The demandant made an entry, and would thereby

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have become repossessed, even if he had given no notice, and if the lease had not provided that no notice should be necessary. *Butcher* v. *Butcher*, 7 Barn. & Cres. 399. *Dorrell* v. *Johnson*, 17 Pick. 266. *Curl* v. *Lowell*, 19 Pick. 25. Bac. Ab. Conditions, O. 2. 4.

Fletcher & Sewall, for the tenant. As the demandant gave notice that he entered for breach of the covenant not to make alterations, he is confined to the breach of that covenant, and cannot resort to the covenant to keep the premises in repair. By giving this notice, he waived his right, if he had any, under the other covenants.

The easements which the demandant claims were not leased to the tenant, and therefore the covenants in the lease do not apply to them. The demandant had no easement in the conductor, for it ceased to be of any use, and the right to it no longer existed. The right depended on the use. A burden on another's land shall not be continued when it is of no benefit to him who claims it. Besides; the removal of the conductor was not the tenant's act. He expressly directed his workmen not to remove it; and he cannot incur a forfeiture by the acts of others, for whom he has not stipulated. Nor was the removal of the turn-buttons his voluntary act. And he cannot incur a forfeiture by the acts of others, for whose doings he has not stipulated; nor for his own involuntary acts. Bac. Ab. Conditions, O. 1. 4 Leon. 38, pl. 104. *Gray* v. *Gray*, Cro. Jac. 525. *Goring* v. *Warner*, 2 Eq. Cas. Ab. 100.* *Jackson* v. *Corliss*, 7 Johns. 531. *Doe* v. *Carter*, 8 T. R. 57. *Doe* v. *Bevan*, 3 M. & S. 353. *Smith* v. *Putnam*, 3 Pick. 221.

The easement in the windows was not reserved by the demandant. His object was to prevent the tenant from claiming this easement. He meant to stop up the windows, if he should obtain the Stodder estate.

Neither of the easements, therefore, was appurtenant to the premises demised, and neither of them passed by the lease. *Kent* v. *Waite*, 10 Pick. 138. *Grant* v. *Chase*, 17 Mass. 443. *Johnson* v. *Jordan*, 2 Met. 234. *Gayetty* v. *Bethune*, 14 Mass. 49. *Whalley* v. *Tompson*, 1 Bos. & Pul. 371.

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The demandant had abandoned the easements, before the demise to the tenant. The cistern, formerly connected with the conductor, had been taken away, and a permanent alteration of the condition of things had been made. *Cherrington* v. *Abney*, 2 Vern. 646. *Moore* v. *Rawson*, 3 Barn. & Cres. 332. Gale & Whatley on Easements, (Amer. ed.) 262.

The taking away of the conductor, even if done by the tenant, was not an "alteration" of the building. That term was used, in the lease, in its popular sense, and meant a change in the character of the building.

Dewey, J. The demandant places his right to enter upon the demanded premises, for breach of the condition annexed to the lease, upon two grounds. 1st. A breach of the condition not to make any alterations in the demised premises. 2d. A breach of the stipulation to keep the premises in such repair as the same were in at the commencement of the lease.

1. Upon the first point, the principal ground of complaint arises from the erection of the building by the tenant on the Stodder lot; and this, it is contended, is a violation of the agreement not to make any alterations in the premises. The effect of this act of the tenant was much considered in the former case between these parties, upon a bill in equity praying for an injunction against the tenant. Without expressing any opinion, as to the legal rights of the plaintiff in the easement claimed by him, the court were of opinion that the acts of the defendant furnished no sufficient ground for complaint by the plaintiff, during the continuance of the lease. *Atkins* v. *Chilson*, 7 Met. 398. The same is equally true in reference to these acts, when put forward, as they now are, as a ground of forfeiture of the lease. The tenant has made no alteration in the building leased to him, by any thing done directly to that building. The alteration, if any is made, is the effect produced by the erection of a building upon the adjacent lot of another person, which, it is alleged, has affected the light and air in reference to the building leased. But the tenant is alone injured by this, if it be an injury; and it is entirely competent for him to remove this new build-

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ing, before the termination of his lease; and he may then restore the leased premises in the state they were in at the time of the taking of the lease. The court are of opinion, therefore, that no breach of the stipulation not to make alterations in the premises leased is shown by the evidence of the erection of the building on the Stodder lot. This being so, and as this is the only alleged breach of the stipulation not to make alterations that is proved to have occurred through the agency of the tenant, the demandant cannot sustain his right of entry for forfeiture for the breach of this particular stipulation.

2. As to the forfeiture of the rights under the lease, by reason of neglect to keep the premises in repair, the tenant insists that this ground is not available to the demandant in aid of the present action, inasmuch as by the form and declared purpose of his entry to revest the estate, no effectual entry was made, except for forfeiture by reason of making alterations in the premises, in violation of the agreement in the lease. The fact is undisputed, that the entry was accompanied by a special written notice, assigning the cause and purpose of such entry to be to take possession "for breach of the covenant against making alterations in the said premises."

The entry might have been good and effectual, if made solely under a declaration of the general purpose to revest the estate, by reason of condition broken, without suggesting any particular breach as the occasion and purpose of the entry. But the question then arises, whether, if the party making the entry superadds to it a declaration of the specific grounds of the alleged forfeiture and cause of entry, he is not bound by his specification, and restricted to the breach alleged as the occasion of his entry. Such seems to us to be the reasonable rule. An estate upon condition subsequent is not defeated, as a matter of course, upon breach of the condition. It is wholly at the election of the party to whom the estate reverts, whether he will avail himself of the breach as a cause of forfeiture. He may decline taking advantage of it; and

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if so, the estate is not defeated. Now if he may wholly waive the right to forfeiture, by declining to enter for a breach, it would seem to follow, that if there are two or more causes of forfeiture, an entry particularly limited to one cause would be equivalent to declining to avail himself of his right of entry for other and distinct causes. This is a sufficient answer to the claim of the plaintiff, that the estate has revested in him by reason of the neglect of the defendant to keep the premises in repair. But if it were otherwise, and the entry of the plaintiff had been for this cause, yet we are strongly inclined to the opinion, that the plaintiff must fail in sustaining this breach as a cause of forfeiture of the lease. The want of repair, in the matter of the conductor, would not, under the circumstances of the case, lead to that result. The neglect to replace it forthwith occasions no injury to the building, nor is in any manner prejudicial to the present right of the lessor. If put in the state in which it was at the time of making the lease, at any period during the term, it will be quite sufficient.

Nothing is shown, therefore, that has occasioned a forfeiture of the lease, and the plaintiff must become nonsuit.

PATRICK DONAHOE *vs.* BENJAMIN F. EMERY & another.

A., as guardian of three of the minor children of a deceased father, and B., as guardian of the other minor children of the same father, sold their wards' real estate at auction, under a license from the probate court, and jointly gave a deed to the purchaser, in which was this covenant: "We, in the capacity aforesaid, do covenant with the said D., his heirs and assigns, that the premises are free of all incumbrances by, through or under us, and that the said D., his heirs and assigns, shall and may peaceably hold and enjoy the same free from the lawful claims and demands of all persons." D. was afterwards evicted by E. to whom the minors' father had mortgaged the premises. *Held*, that A. and B. were personally and jointly liable to D. on the covenant for quiet enjoyment.

When a grantee, who is evicted by the holder of a mortgage made prior to his grant, sues his grantor on the covenant for quiet enjoyment, he is not entitled to recover damages beyond the amount of the mortgage debt, if the mortgage be not foreclosed.

THIS was an action on a covenant of quiet enjoyment contained in the following deed: "Whereas we, Benjamin F.

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Emery, guardian of John Havelin, Ann Havelin and Edward Havelin, and John Dee, guardian of Elizabeth Havelin and Ellen Havelin, minor children of John Havelin, late of Boston, deceased, by order of the probate court for the county of Suffolk, holden on the 31st of May 1841, were licensed to make sale of the real estate of said minors, for their maintenance and support; therefore we, the said John Dee and Benjamin F. Emery, guardians as aforesaid, as well by virtue and authority of the power to us given as aforesaid, as in consideration of the sum of $1210 paid us by Patrick Donahoe of said Boston, do hereby, in our said capacity, grant, bargain, sell and convey unto said Patrick Donahoe, a dwelling-house and land underneath and adjoining it, being number thirty-five in Poplar Street, and conveyed to said John Havelin by James Denton, as by deed recorded in Suffolk registry, book 414, page 66; the same being subject to the dower of the widow of John Havelin aforesaid. To have and to hold the same, with all the privileges and appurtenances thereof, to him the said Patrick Donahoe, his heirs and assigns forever. And we, in the capacity aforesaid, covenant with the said Patrick Donahoe, his heirs and assigns, that the said John Havelin died seized of the premises; that we were duly licensed by said court to sell the same, and that it was necessary the same should be sold for the purposes aforesaid; that previous to the intended sale, we took the oath by law prescribed, gave bonds, as the law in such case directs, and public notice of said sale, according to the directions of the law in such case made and provided; and that said Patrick Donahoe offered most for said premises, and the same were thereupon struck off to him, for the sum aforesaid, at a public vendue held on said premises on Monday the 28th day of June instant. And we do further, in the capacity aforesaid, covenant to and with the said Patrick Donahoe, his heirs and assigns, that the premises are free of all incumbrances by, through or under us, and that the said Donahoe, his heirs and assign forever, shall and may peaceably hold and enjoy the same free from the lawful claims and demands of all persons. In

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witness whereof we have hereunto set our hands and seals, the thirtieth day of June in the year of our Lord eighteen hundred and forty one. Benj. F. Emery. (seal.)
John Dee. (seal.)"

The defendant Emery was defaulted; and the plaintiff and Dee submitted the case to the court, on the following facts agreed: "The defendants, by the aforesaid deed, conveyed to the plaintiff the estate therein described, for the sum therein mentioned. Said estate belonged to certain minors, of whom the defendants were severally guardians, and was sold pursuant to a license duly granted by the probate court. The plaintiff entered upon the estate, and on the 28th of May 1842, was lawfully evicted therefrom by Thesta Dana, by virtue of a mortgage of the estate, made to her by John Havelin, father of the said minors, in his life, jointly with one Denton, with whom, at that time, said Havelin owned the estate in common."

It was agreed that if the defendant Dee was personally liable to the plaintiff, in this action, upon the covenant declared on in the writ, judgment should be rendered in favor of the plaintiff for such damages as he should by law be entitled to recover; otherwise, that the plaintiff be nonsuited.

G. T. Curtis & Story, for the plaintiff. The defendants, though denominating themselves guardians, executed the deed in their personal capacity, and are therefore personally liable on their covenants. Story on Agency, § 148. 2 Wheat. 56, *note*. *Combe's case*, 9 Co. 76. *Appleton* v. *Binks*, 5 East, 148. *Lutz* v. *Linthicum*, 8 Pet. 165. *Sumner* v. *Williams*, 8 Mass. 162. *Whiting* v. *Dewey*, 15 Pick. 428. *Forster* v. *Fuller*, 6 Mass. 58. *Thacher* v. *Dinsmore*, 5 Mass. 299. The defendants are also jointly liable on their covenants, as they jointly conveyed the estate. *Coleman* v. *Sherwin*, 1 Salk. 137. Bac. Ab. Covenant, B. Hammond on Parties, 48.

C. H. Parker, for Dee. The defendants' covenant for quiet enjoyment is either a part of the sentence which precedes it, and is therefore only a covenant for their own acts; or, if it is an independent covenant, it is to be governed by the

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Emery, guardian of John Havelin, Ann Havelin and Edward Havelin, and John Dee, guardian of Elizabeth Havelin and Ellen Havelin, minor children of John Havelin, late of Boston, deceased, by order of the probate court for the county of Suffolk, holden on the 31st of May 1841, were licensed to make sale of the real estate of said minors, for their maintenance and support; therefore we, the said John Dee and Benjamin F. Emery, guardians as aforesaid, as well by virtue and authority of the power to us given as aforesaid, and in consideration of the sum of $1210 paid us by Patrick Donahoe of said Boston, do hereby, in our said capacity, grant, bargain, sell and convey unto said Patrick Donahoe, a certain ing-house and land underneath and adjoining it, being number thirty-five in Poplar Street, and conveyed to said John Havelin by James Denton, as by deed recorded in Suffolk book 414, page 66; the same being subject to the right of the widow of John Havelin aforesaid. To have and to hold the same, with all the privileges and appurtenances thereto, to him the said Patrick Donahoe, his heirs and assigns forever. And we, in the capacity aforesaid, covenant with said Patrick Donahoe, his heirs and assigns, that said John Havelin died seized of the premises; that we were licensed by said court to sell the same, and that the same should be sold for the purposes previous to the intended sale, we took and gave bonds, as the law in such cases provides, of said sale, according to the [illegible] case made and provided; and that at the auction we offered most for said premises, and the same were struck off to him, for the sum aforesaid; and that we will hold said premises and we do [illegible] to [illegible] th the said premises [illegible] remises [illegible] s, and [illegible] all a [illegible] the

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The [redacted] ıants as valid and bind-
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[redacted] s no bearing on the other
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[redacted] nd for each other. This ques-
[redacted] d by the rules of construction,
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[redacted] rules are laid down by Platt, in
[redacted] Part. I. *c.* 3, § 2, and are fully sup-
[redacted] cited. Where two or more persons
[redacted] by the words "we covenant," the
[redacted] covenant, and are to be so considered,
[redacted] contract it should appear that such was
[redacted] g of the parties. If two covenant gen-
[redacted] s, without any words of severance, or that
[redacted] them, shall do such a thing, a joint charge
[redacted] to implied covenants, as on the word
[redacted] declaration alleges, as a breach, that at the
[redacted] ıise a stranger was seized in fee, so that the
[redacted] t a right to demise the premises, it must be
[redacted] the lessors. But a breach by the tortious act of
[redacted] lessors will support an action against him alone.
[redacted] case on this head is *Coleman* v. *Sherwin*, reported
[redacted] k. 137, and other books. In that case, the plaintiff
[redacted] ed that the defendant and one J. S. demised to the plain-
[redacted] or seven years, *virtute cujus* he entered and was possessed;
[redacted] the defendant and one A., by his command, entered upon
[redacted] e plaintiff, and turned him out of possession; and that
[redacted] neither the defendant nor the said J. S. had or ought to have
demised the premises, but, at the time of the demise, one R.

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whole context, according to the meaning to be derived from the whole instrument. On the plaintiff's construction, the two clauses which contain covenants are inconsistent; one containing covenants against the defendants' own acts, and the other a covenant against all the world. Such a construction is not to be adopted. *Watchman* v. *Crook*, 5 Gill & Johns. 239. *Ludlow* v. *McCrea*, 1 Wend. 228. *Browning* v. *Wright*, 2 Bos. & Pul. 13. *Sicklemore* v. *Thistleton*, 6 M. & S. 12. *Iggulden* v. *May*, 7 East, 241. *Doe* v. *Godwin*, 4 M. & S. 265. 1 Walford on Parties, 479.

The defendants were severally guardians of different minors, and their covenants should be construed to be several and not joint. See *Smith* v. *Pocklington*, 1 Crompt. & Jerv. 445. *Collins* v. *Prosser*, 1 Barn. & Cres. 682. *Lee* v. *Nixon*, 1 Adolph. & Ellis, 201.

Wilde, J. This is an action upon an alleged breach of the defendants' covenant for quiet enjoyment of real estate by them conveyed to the plaintiff. The defendants were guardians of five minor children; the said Emery being the guardian of three of them, and the said Dee of the other two. And they, in their said capacities, being duly licensed by the probate court, sold and conveyed to the plaintiff a certain dwelling-house and land, as the property of the said minors; and, with other covenants, covenanted with the plaintiff that he, his heirs and assigns, should forever peaceably hold and enjoy the premises free from the lawful claims and demands of all persons. It is admitted that the plaintiff has been since lawfully evicted therefrom, by Thesta Dana, by virtue of a mortgage deed of the premises from the father of the said minors.

The questions are, whether the defendants are personally liable; and if so, whether their covenant is to be considered joint or several.

The first question we consider as settled by a current of authorities, and as no longer an open question. The principle is, that when a party contracts *en auter droit*, having no authority to bind his principal, he is to be held personally liable. Otherwise, the other contracting party can have no remedy

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for a breach of the contract. It is true that the defendants were not under any obligation to make the covenant in question, and some other covenants in the deed, such as the covenant of seizin, &c. But the purchaser undoubtedly took the deed in reliance on all the covenants as valid and binding covenants; and he had a good right so to rely for his security.

This consideration, however, has no bearing on the other question, viz. whether the covenant was joint or several; for in either case it may be equally valid, although not equally beneficial to the covenantee; as, in the former case, the covenantors would be mutually bound for each other. This question, therefore, must be decided by the rules of construction, as established by the principles of the common law found in the authorities. These rules are laid down by Platt, in his treatise on covenants, Part. I. *c.* 3, § 2, and are fully supported by the cases there cited. Where two or more persons covenant with another by the words "we covenant," the words indicate a joint covenant, and are to be so considered, unless from the whole contract it should appear that such was not the understanding of the parties. If two covenant generally for themselves, without any words of severance, or that they, or any one of them, shall do such a thing, a joint charge is created. So as to implied covenants, as on the word "*dimiserunt*," if a declaration alleges, as a breach, that at the time of the demise a stranger was seized in fee, so that the lessors had not a right to demise the premises, it must be against both the lessors. But a breach by the tortious act of one of the lessors will support an action against him alone. A leading case on this head is *Coleman* v. *Sherwin*, reported in 1 Salk. 137, and other books. In that case, the plaintiff declared that the defendant and one J. S. demised to the plaintiff for seven years, *virtute cujus* he entered and was possessed; and the defendant and one A., by his command, entered upon the plaintiff, and turned him out of possession; and that neither the defendant nor the said J. S. had or ought to have demised the premises, but, at the time of the demise, one R.

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was seized thereof in fee. And it was held that as the interest granted by the word *dimiserunt* was joint, so was the covenant imported by it; and then as to the breach of their being not seized at the time of the demise, the action ought to have been against both the lessors, and could not be maintained against the defendant alone. But as to the tortious entry, the action was well enough against the defendant only; for it was his own act, and in construction each did demise, and it was a several covenant as to their own acts subsequent. S. C. Carth. 97. Comb. 163. 1 Show. 79. This principle, and the distinction, are supported by various authorities before and after the said decision; 2 Stephens Nisi Prius, 1130, 1131; and its correctness does not appear to have been ever questioned. And it is decisive in the present case. The defendants' covenant was for quiet enjoyment against the lawful demands of all persons; and the breach is by a party having a paramount title, and not by any subsequent act of the defendants.

As to the question of damages, the general rule is, that they are to be assessed to the value of the land at the time of the eviction. But this rule might operate unjustly in the present case; for Thesta Dana, by whom the plaintiff was evicted, had a mortgage deed only, the amount due on which does not appear. But it does appear that the same is not foreclosed; and the equity of redemption may be valuable. The plaintiff, therefore, may restore himself to possession, by paying the mortgage debt and interest, and the costs of suit. And to this amount only he is entitled to recover; and even this will operate hardly upon the defendant Dee, who probably trusted to his co-defendant to examine the title, and to prepare the deed. He is by law responsible, however, for his negligence and carelessness. But in the settlement of his probate account, there seems to be no objection to the allowance of the amount of the mortgage debt to his credit; and thus he may be indemnified, except for costs and expenses, for which he has no indemnity and must probably bear the loss; for the minors certainly ought not to be chargeable, in law or equity, for the negligence or the mistakes of their guardians. The rule

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laid down was adopted in *Tufts* v. *Adams*, 8 Pick. 550, and confirmed in *White* v. *Whitney*, 3 Met. 81. And it seems founded on a principle of reciprocal justice. The plaintiff is entitled to indemnity, and no more; and to compel the defendants to pay the full value of the estate would be unjust, if it exceeded the amount of the incumbrance. If such is the fact in the present case, judgment will be entered for the plaintiff, for the amount of the mortgage, including interest, and the costs of the suit against him by the mortgagee, who will be accountable to him for the rents and profits received by her, if he redeems the mortgage.

HENRY PEIRCE & another *vs.* ADDISON RICHARDSON & another.

The provision in the Rev. Sts. c. 90, §§ 83, 84, that "when any person shall claim any title or interest, by force of a subsequent attachment, or purchase, or mortgage, *or in any other manner*, in any estate that is attached in a suit between other persons, such claimant may be allowed to dispute the validity and effect of the prior attachment, and may file his petition praying that the prior attachment may be dissolved," does not authorize a person, to whom property was mortgaged before it was so attached, to maintain such a petition.

THIS action, and two others brought by other plaintiffs, were commenced, in the court of common pleas, against the surviving partners of the firm of A. Richardson & Co., and property was attached to secure the demands of the respective plaintiffs. Lewis Richardson petitioned said court that he might be allowed to dispute the validity and effect of the plaintiffs' attachments, on the ground that the sums demanded in their suits were not justly due; and prayed that those attachments might be dissolved. In his petition, he alleged that Addison Richardson, George H. Holbrook and Asa Harding, jr. entered into partnership in 1838, under the firm of A. Richardson & Co.; that in October 1840, said Addison, with the consent of said Holbrook and Harding, sold his interest in said partnership to Moses H. Daniels, and retired from

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th ; firm; that said Daniels was permitted by said Holbrook and Harding to take said Addison's place, and that they assumed the style of George H. Holbrook & Co.; that, at this time, the liabilities of the firm of A. Richardson & Co. were less than $6000, and their assets more than $9000; that said Holbrook and Harding, in consideration of said Addison's retiring, and his surrendering to them all the assets of said firm, agreed with him to assume and pay all the debts of said firm, and save him harmless from the same; that they immediately took possession of all said assets, and advertised the dissolution of the partnership, and in their advertisements gave notice to all the debtors of said firm to make payment to them, and to all the creditors of the firm to call on them for payment; and that they had appropriated all said assets to their own use: That the claims on which the plaintiffs aforesaid have brought their actions, if any such ever existed, were outstanding debts of A. Richardson & Co. at the time of the dissolution aforesaid, which said Holbrook and Harding agreed to assume and pay, and which said Holbrook, through his agent, John Baker, has paid to said plaintiffs: That the said plaintiffs' suits are feigned and fraudulent, commenced and carried on in their names by said Holbrook, for his own fraudulent purposes, and to defraud the said Addison and his honest creditors out of a large sum of money: That upon the writs in said plaintiffs' suits, the individual personal property of said Addison was attached, to the amount of $1500; which property was, at the time of the attachments, under a mortgage and pledge to the petitioner, and was also in his possession, as security to him of a debt justly due to him from said Addison, for more than its full value, viz. for the sum of $2000, and interest.

The plaintiffs objected that the statements in said petition were not sufficient in law to entitle the petitioner to appear for the purposes therein mentioned, and prayed that the petition might be dismissed. But the court, being of opinion that the statements in said petition were sufficient to bring the petitioner within the provisions of the Rev. Sts. *c.* 90, overruled the

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objection, and admitted the petitioner to appear for the purpose of disputing the validity and effect of said attachments. The plaintiffs thereupon filed exceptions.

G. M. Brown, for the plaintiffs.

F. W. Sawyer, for the petitioner.

WILDE, J. This appears to the court to be a very clear case. The petitioner prays to be allowed to defend this and two other actions in which he is not a party, on the ground that the claims of the plaintiffs are fraudulent; that the sums demanded are not justly due; and that, at the time when the several attachments in said suits were made, the property attached, being personal property, was under a mortgage and pledge to the petitioner, and in his possession, as security, for more than its full value.

On the facts averred, the petitioner's counsel contends, that he has a right, by the Rev. Sts. *c.* 90, § 83, to dispute the validity of said attachments. That section provides, that "when any person shall claim any title or interest, by force of a *subsequent* attachment, or purchase, or mortgage, *or in any other manner*, in any estate, real or personal, that is attached in a suit between other persons, such claimant may be allowed to dispute the validity and effect of the prior attachment, on the ground that the sum demanded in the first suit was not justly due, or that it was not payable when the action was commenced." It seems very clear that no person can be allowed to dissolve an attachment under this section, unless he has some title or interest, "by force of a subsequent attachment, purchase or mortgage, or in any other manner;" for such are the express words of the statute. It was argued for the petitioner, that the words "in any other manner" are not controlled by the previous word, "subsequent," and the following words, "prior attachment." But there appears no reason for such a construction. The object of this evidently was, to enable a party to prevent his title from being intercepted by a fraudulent attachment — which, if not fraudulent would defeat his title — and to give him a summary remedy to defeat the fraudulent attempt; or in case of a suit com-

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menced by mistake, to recover a debt before it is payable. But a party who has a *prior* title cannot be defeated by subsequent attachment of the property as the property of the party from whom he had derived his title. The words "any other manner" were intended to protect a title to property acquired otherwise than by attachment, purchase, or mortgage; for instance, by pledge or other lien; or where real estate descends to an heir, or personal estate goes to an executor. But in all cases, the petitioner's title must be derived to him subsequently to the attachment sought to be dissolved; for a subsequent attachment cannot prejudice a previous valid claim.

It was also argued that the petitioner's title may be legal and just as against the debtor, but fraudulent against creditors. This argument is directly in opposition to the allegations contained in the petition, made under oath. The petitioner states that his estate is legal in every respect, and that the debt is justly due. But if it were otherwise, it is clear that he would not be allowed to dispute the claim of another party equally fraudulent. The rule of law is, that a party, coming into court to enforce a claim, must come with clean hands. It was so decided in *Alexander* v. *Gould*, 1 Mass. 165, and it is founded on a just principle of public policy. This, however, is not the present case. The petitioner expressly denies any fraud or illegality whatever. We are, therefore, clearly of opinion, that this petition cannot be allowed. The only mode provided, whereby the petitioner could have dissolved the attachment, was under the Rev. Sts. c. 90, §§ 78, 79. He might have demanded of the officer the debt secured to him by the mortgage, and if the same had not been paid or tendered to him within twenty four hours thereafter, the attachment would have been dissolved, and the officer would have been obligated to restore the property to him, and the attaching creditor would have been liable to him for any damages he might have sustained by the attachment.

Exceptions sustained, and petition dismissed.

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Nathaniel Melcher *vs.* City of Boston.

A clerk in a post office, who is appointed by the deputy postmaster, and his appointment approved by the postmaster general, is taxable for the income derived from his employment as such clerk.

Assumpsit to recover back the amount of taxes on the income of the plaintiff, assessed upon him by the assessors of the city of Boston, and paid by him to the city collector. Trial in the court of common pleas, before *Warren*, J. who reported the case as follows:

"It was agreed that, during the six years next before the commencement of the action, the plaintiff was a citizen of Boston, and was, in each year, taxed for his 'income;' that the amount of such tax was, in each year, paid under protest; that during all the time aforesaid, he was a clerk in the post office in Boston; that he had no property liable to taxation that he had no income besides that derived from his employment as such clerk; and that his salary, as such clerk, was the only subject of taxation in the said years.

"It was further agreed that, in practice, the clerks in said post office were appointed by the postmaster at Boston, subject to the approval of the postmaster general, who, by usage, exercises the power to remove any such clerk, at his pleasure; that the plaintiff was thus appointed by the postmaster at Boston, and that his appointment was approved by the postmaster general; that an annual appropriation was made by congress, during the years aforesaid, for the pay of the clerks in the several post offices throughout the country; that, of the amount thus appropriated, the postmaster general set apart a certain sum to defray the expenses of clerk hire in the Boston post office; that this sum was apportioned, by the postmaster at Boston, among the various clerks in his office; and that the portion thus assigned to the plaintiff constituted the income for which he was taxed as aforesaid.

"The postmaster at Boston testified, that after the apportionment of the salaries was made, by him, among the clerks

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in his office, the statement of such apportionment was forwarded by him to the postmaster general, for his approval, before the salaries were paid over.

"Upon these facts, the court instructed the jury that the plaintiff was entitled to a verdict, which was returned for him accordingly. To this instruction the defendants alleged exceptions."

J. Pickering, (City Solicitor,) for the defendants. By the Rev. Sts. *c.* 7, § 4, "income from any profession, trade or employment," is included in the personal estate which is made subject to taxation; and there is no exemption, in § 5, of income derived from an office held under the government of the United States. But if there were such an exemption, it would not assist the plaintiff; for he is not an officer of the United States. A postmaster is such officer, but not his clerks. The United States *St.* 1825, *c.* 275, § 11, requires every postmaster to have "one or more persons" to attend at his office; and § 42 forbids any "clerk employed in any post office" to be a contractor, &c. for carrying the mail. But there is nothing in this statute which prescribes the mode or source of the appointment of clerks, except in the postmaster general's office. A certain sum, as the case finds, is allowed by the postmaster general for clerk hire; but the deputy postmaster (in Boston, if not elsewhere,) fixes the clerks' salaries.

Putnam, for the plaintiff. The State cannot tax the income derived from an office held under the laws of the United States. *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, reversing the judgment of the supreme court of Pennsylvania in 7 Watts, 513. *M'Culloch* v. *State of Maryland*, 4 Wheat. 316. *Weston* v. *City Council of Charleston*, 2 Pet. 449.

The clerks in post offices are officers of the United States. "An office," says Marshall, C. J. "is a public charge or employment, and he who performs the duty of the office is an officer. If employed on the part of the United States, he is an officer of the United States." 2 Brock. 102. Clerks in post offices are the "inferior officers," whose appoint-

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ment may, by the constitution of the United States, art. II. § 3, be vested by congress "in the heads of departments." See *Ex parte Hennen*, 13 Pet. 260. The facts in the case at bar show how the plaintiff was appointed to his office. By the United States *St.* 1836, *c.* 270, §§ 2, 22, the postmaster general is required to submit to congress yearly specific estimates of the sums expected to be required for the service of the department, including, among other things, "clerks for offices," and to make report, yearly, of all these expenses. And, by § 9, he is to control "the expenses of post offices, and all other expenses incident to the service of the department." By the United States *St.* of March 3d 1843, *c.* 100, $210,000 were appropriated for clerks for the offices of postmasters. If their salaries are taxable, they will be diminished by taxation, contrary to the law as laid down in 16 Pet. 435.

Pickering, in reply. In the case cited from 16 Pet. 435, the plaintiff was captain of a revenue cutter of the United States; and it was admitted, in the statement of facts, that he was an officer of the United States. In the case at bar, this is neither admitted nor shown. Besides; Dobbins was "rated and assessed for his *office*."

The cases cited from 4 Wheat. and 2 Pet. merely decided that States have no authority to tax any of the constitutional means employed by the government of the United States to execute its constitutional powers; as the Bank of the United States, and stock issued for loans made to the United States. It was admitted that the owners of stock in the bank were taxable therefor, as for any other property. On the same principle, the income from an office conferred by authority of the United States would seem to be the subject of lawful taxation.

Dewey, J. The plaintiff relies upon the case of *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, as an authoritative decision governing the present case. Giving to that decision all the force and effect of a judgment of the highest tribunal, upon the question there raised, yet there arise, in the case at bar, two important questions for our considera-

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tion. 1st. Was the plaintiff an officer of the United States, in any such sense as would entitle him to the immunities from taxation which were adjudged to attach to Dobbins as a captain of the United States revenue cutter? 2d. May not a tax upon "income" be assessed upon all citizens of Massachusetts residing therein, as well where such income is derived from the national government, by way of compensation for services rendered to it, as from any other source?

As to the first point, we have looked in vain for any statute provision creating any such corps of United States officers as clerks in the post office. The practice has existed, it seems, of making such appointment of clerks on the recommendation of the local deputy postmaster to the postmaster general, and approval by him. The authority to employ these agents, and others of all the various grades, connected with the carrying and opening of the mails and conducting the concerns of the post office generally, is undoubtedly properly exercised by the post office department. But the *St.* of 1825, *c.* 275, which is understood to be particularly relied upon as the act regulating the post office department, does not, in terms, create any such office, or give any such character to these agents, as entitles them to be denominated public officers of the national government. It authorizes the employment of persons to assist in the various duties of taking care and custody, and the conveying of the mail, and prescribes the form of an oath to be taken by all such; and money has, from time to time, been appropriated to pay the contingent expenses of the post office, which money has been in part applied to the payment of the clerks in the various post offices.

We do not perceive any thing in the statute regulating the post office department, or in the duties discharged by the plaintiff, as a clerk under the deputy postmaster, which should require us to recognize the service of the plaintiff as that of one holding a public office; certainly not an office of that character which entitles him to an exemption from the common burdens of taxation based upon actual income.

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The case in 16 Pet. 435, already referred to, was essentially different. Dobbins was a captain of the United States revenue cutter. He was an officer of the United States, appointed by the president, under the provisions of a statute creating the office. It was a clear case of one holding an office under the United States government. The statute of Pennsylvania, under which the question arose, authorized the assessment of a tax "upon all offices and posts of profit." The tax was upon the office. The taxing power assumed to deal with him as one holding an office. In the case at bar, no such recognition of the party as a public officer exists, and no tax was assessed upon the office.

It is not every employment in the United States service that constitutes the person thus employed an officer. Thus it has been held that a contractor for carrying the mail is not an officer of the United States government. *Whitehouse* v. *Langdon*, 10 N. Hamp. 331.

As it seems to us, the plaintiff has failed to bring himself within the case of *Dobbins* v. *Commissioners of Erie County*; not being an officer of the United States in any such sense as will exempt him from taxation in common, and in the like manner, with all other citizens and residents of Massachusetts. He is therefore liable to taxation "for income," and that as well for income derived from compensation for services rendered to the national government, as from any other source.

2. This view of the case renders it unnecessary to express any opinion upon the second question, viz. whether a tax "upon income" may not well be assessed upon one holding a public office under the general government, and where "the income," which is the subject of taxation, is the compensation received as allowance for services rendered in such public office. This question we do not propose to examine particularly, much less to decide; but we deem it proper to say that such form of taxation may present a different question, and authorize a different decision, from that in *Dobbins's case*, 16 Pet. 435. The tax upon income is not a tax upon the office directly. It would seem to be only carrying out the great prin-

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cip'e of assessing taxes proportionally and equally, according to the ability of the persons taxed. Its form is unobjectionable, pointed at no particular class, whether office-holders or otherwise, but embracing, as proper subjects of taxation, all who place themselves under the protection of our local government, and participate, in common with others, in the free enjoyment of our schools, our humane institutions, the protection of our laws and the benefits resulting from their due administration, our public ways, and all those beneficent objects for which these taxes are assessed. We are not disposed to assume, in advance, that the supreme court of the United States will decide that a tax "upon income" will be illegal, if assessed upon a resident of Massachusetts, deriving his income from the compensation allowed him for services as an officer of the United States. But, without expressing any further opinion on that point, we are all clearly of opinion that the plaintiff was, for the other reason already stated, subject to taxation for his "income," and that this tax was therefore properly demandable of him.

JOHN WELCH *vs.* BENJAMIN H. ANDREWS.

A. gave a bond to B., engaging to convey to him certain real estate, on his paying A. $5000 in three years, with yearly interest, and agreeing that B. might enter upon the estate, and retain possession thereof, so long as the bond should remain in force, without any charge for rent: B. entered and remained in possession three years, paid the first two years' interest on $5000, and then surrendered the estate to A. without paying the third year's interest. *Held*, that A. could not recover of B. pay for the use and occupation of the estate during the third year.

ASSUMPSIT for money had and received, and on an account annexed to the writ. This account was for "rents received," by the defendant, "from tenants of the plaintiff's houses in the north part of Boston, say $450."

This case was submitted to the court on the following statement of facts: The plaintiff, on the 9th of May 1839, in consideration of certain services, estimated at $300 and upwards, performed for him by Charles McIntire, executed and

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delivered to said McIntire a bond, in the penal sum of $8000. The condition of this bond — after reciting that the plaintiff had received deeds of certain real estate in Boston, and had agreed to convey the same estate to said McIntire, on certain terms — was in these words: "Now, if the said McIntire, his heirs, executors, administrators or assigns, shall, within three years from the date hereof, pay said Welch the sum of $5000, with interest annually, (first deducting, however, therefrom all sums of money which may be due on certain mortgages now existing on the premises,) then this obligation shall be void; otherwise, remain in full force: It being, however, understood and agreed, that said McIntire, or his assigns, may enter and retain possession of the premises, without any charge for rent, so long as this obligation remains in force; and that said McIntire, or his assigns, may pay the interest on said mortgages, as it falls due, to the party entitled thereto; and such payment shall be deducted from the interest payable on the $5000, as above set forth." On the 19th of October 1839, the said McIntire assigned the said bond to the defendant, for a valuable consideration; and the plaintiff afterwards gave a bond to the defendant, *dated* May 9th 1839, in the penal sum of $8000. The condition of this bond was the same as that of the foregoing bond, (substituting the name of the defendant for that of McIntire,) with this addition, viz. that upon the payment, by the defendant, or his representatives or assigns, of the sum of $5000, &c. "said Welch shall thereupon convey to said Andrews, his heirs or assigns, by a good and sufficient deed of quitclaim," the said real estate. To this last bond was affixed the following memorandum of agreement: "It is expressly understood, that in case the annual interest within stipulated for shall not be paid within thirty days after it shall become due to said Welch, and if the principal sum of $5000 shall not be paid within thirty days after the expiration of said three years, all rights and claims of the obligee or his assigns, under this bond, shall cease and determine.

B. H. Andrews.
John Welch."

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The defendant, by his agent, received the rent of the said premises, (amounting to about the interest on $5000,) during the three years, and no longer, and he paid to the plaintiff the first two years' interest; but, at the expiration of the third year, and for thirty days after, he failed and refused to pay that year's interest, and the principal sum of $5000; and the said interest and principal are still unpaid. The defendant, at the expiration of three years from the date of the bond, and before the expiration of the thirty days above mentioned, surrendered the premises to the plaintiff, and notified to him that he should not take them, and that he claimed no further interest or estate therein.

The "premises" mentioned in the condition of the plaintiff's bond, and which were surrendered to him by the defendant, as above stated, were the "houses" referred to in the plaintiff's account annexed to his writ.

The plaintiff, before the commencement of this action, demanded of the defendant payment of said interest or rent.

Judgment to be rendered for the plaintiff, or he to become nonsuit, according to the opinion of the court on the foregoing facts.

H. H. Fuller & Andrew, for the plaintiff.

H. W. Fuller, for the defendant.

Dewey, J. The plaintiff does not claim to recover upon any express contract to pay him rent, but relies upon the implied assumpsit arising from the use and occupation by the defendant, and his receipt of rent from tenants occupying under him, connected with the circumstances shown in the case, under which this occupation and taking of the rents were enjoyed by him.

The plaintiff gave a bond, in the penal sum of eight thousand dollars, to Charles McIntire, with whose interest the defendant was subsequently connected as assignee, to convey certain real estate to said McIntire, at any time within three years from the date of the bond, upon payment of five thousand dollars and interest annually; it being agreed that the said McIntire, or his assignees, might enter upon and retain

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possession of the said premises, without any charge for rent. Subsequently, said McIntire assigned this bond to the defendant, after which the plaintiff executed and delivered to the defendant the bond set forth in the case. The defendant paid the annual interest for two years, but no longer. In consequence of the nonpayment of the third year's interest, and the principal within three years, this bond ceased to be obligatory on the plaintiff; and the defendant, after three years, abandoned all right to the future possession of the premises. The result has been, that the defendant has enjoyed the beneficial use of the premises for the term of three years, but the plaintiff has received his annual interest for only two years. This state of things seems, at the first view, to present a meritorious claim on the part of the plaintiff; and this ground is strongly urged, as furnishing sufficient reason for charging the defendant, upon an implied assumpsit, for the use and occupation during the third year. But it is to be borne in mind that the entry and occupation of the premises by the defendant were under a written contract, and that the rights of the parties are to be regulated by its terms. By the contract it was stipulated that the defendant should enter upon and retain possession of the premises, "without any charge for rent." This express contract necessarily excludes any implication of such a promise as would ordinarily arise, from the use by one man of the real estate of another, to pay a reasonable rent therefor. McIntire, whose assignee the defendant is, paid a valuable consideration for this contract. The main and leading object of the contract was, to acquire the right to purchase the premises at any time during the period of three years. This right the plaintiff gave him, upon the condition that the plaintiff should be paid the annual interest on the sum to be paid as purchase money, and the principal sum within three years. But it is equally a part of this contract, that the defendant should have the use of the premises without any charge for rent. It is so declared in the bond. The parties doubtless looked to the result of a transfer of the estate to the defendant, upon the terms of the bond, viz. the payment of annual interest on the

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five thousand dollars, and the payment of the five thousand dollars in three years; in which event, it may be presumed the plaintiff would have made no claim for rent. The defendant's assignor had paid $300 and upwards for the privilege secured to him by the bond; and the plaintiff might well anticipate that the defendant would avail himself of his right to purchase the premises, by complying with the conditions of sale. There may have been an omission to stipulate for this contingency, as the plaintiff would have required the defendant to do, if he had foreseen this result. But that will not avail the plaintiff, if he has, by his written contract, given the defendant the right to enjoy the use of the premises free of rent.

The plaintiff insists that however this may have been under the contract originally made with McIntire, yet that by force of the memorandum appended to the new agreement made with the defendant — in which it was stipulated that in case the annual interest contracted for in the bond should not be paid within thirty days after the same should become due, or the principal sum of five thousand dollars should remain unpaid for thirty days after the expiration of the said three years, then all rights and claims of the obligee, or his assignee, under said bond, should cease and determine — the liability to pay rent for the third year may arise. The position taken by the plaintiff is, that the right to enjoy the premises free of rent was conditional, depending upon the payment of the annual interest within thirty days after the same became due, and the principal sum of five thousand dollars within thirty days after the expiration of three years from the date of the bond; and that, upon failure to perform this condition, the party lost the benefit of the stipulation that he was to enjoy the premises free from any charge for rent. We think this construction of the clause found in the memorandum is not sound, nor warranted by the language of it. The provision, that upon failure to pay as above stated, "all rights and claims of the obligee shall cease and determine," has no reference to the past, but is wholly prospective, or at least is applicable merely

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to the present time. It determines all right of the defendant to require the plaintiff to make the conveyance of his estate as stipulated, and it also determines all right to the future use and occupation of the premises; and this is its whole effect; leaving the parties, as to the past, to adjust their respective claims agreeably to the stipulations in the bond.

The plaintiff, therefore, cannot maintain his action upon the implied assumpsit, and is not entitled to judgment against the defendant, for the use and occupation of the premises for the third year.

Plaintiff nonsuit.

JOHN HENSHAW & others *vs.* HENRY ROBINS.

When a bill of parcels is given, upon a sale of goods, describing the goods, or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be. And this rule applies, though the goods are examined by the purchaser, at or before the sale, if they are so prepared, and present such an appearance, as to deceive skilful dealers.

ASSUMPSIT on an alleged warranty by the defendant, upon a sale of indigo by him to the plaintiffs. The declaration also contained a count for money had and received.

At the trial in the court of common pleas, before *Warren*, J. it was agreed that the defendant, on and before the 9th of August 1843, was an auctioneer in Boston, doing business under the name of Thomas W. Sears & Co.; that for some days previous to said 9th of August, he had advertised for sale by public auction, at his store, on that day, sundry articles of merchandize, and, among others, "two cases of Manilla indigo, of superior quality;" that, previously to the sale, the cases containing the article thus described were opened, and a full opportunity given for their examination and inspection; that one of the plaintiffs, who were drug merchants in Boston, attended the sale on said 9th of August, and examined the article; that the two cases aforesaid were struck off to him, as the highest bidder therefor; that the same were

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immediately delivered to him, with the following bill of parcels: "August 9, 1843. Henshaw & Co. bought of Thomas W. Sears & Co. two cases of indigo — $272·35;" and that the said cases were then paid for and taken away by the plaintiffs.

The plaintiffs then introduced evidence tending to show, that the article then paid for, and delivered to them, was not indigo, but was a substance composed as follows: Of Prussian blue seventy six parts, of the chromate of iron twenty parts, and of potash four parts; that the same was worthless for any purpose, and was not known in the market by the name of indigo, although an article, similar in appearance and equally worthless, which had been imported from Manilla, had once before been sold in Boston, by auction, as and for Manilla indigo.

It was agreed, that within a reasonable time after the said sale, and as soon as the plaintiffs discovered the true character of the said article, they returned it to the defendant, and demanded the amount which they had paid for it. It was also agreed, that the article in question was so prepared as to deceive skilful dealers in indigo; and that no fraud, or dishonorable or unfair conduct, was imputable to the defendant; that he was ignorant of the true character of the article sold by him; that he, in making the sale, acted as agent for the owner of the article; and that he defended this action, under the owner's instructions, and upon his responsibility.

The court instructed the jury, "that the bill of parcels, delivered by the defendant to the plaintiffs, contained a warranty that the article sold and delivered to them was indigo; and that, if the jury were satisfied that it was not indigo, nor known to merchants, nor in the market, as indigo; and that it was worthless; and that the plaintiffs, within a reasonable time after the sale, returned the article to the defendant, and demanded the price paid therefor; and if the article was so prepared, and presented such an appearance, as would deceive skilful dealers in indigo; the plaintiffs were entitled to a verdict for the sum paid by them." A verdict was returned for

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the plaintiffs, and the defendant alleged exceptions to said instructions.

Robins, for the defendant. When there is an opportunity for the buyer to examine an article before the sale, and he makes an examination, there is no implied warranty that the article is what it is described to be in the bill of parcels. *Seixas* v. *Woods*, 2 Caines, 48. *Swett* v. *Colgate*, 20 Johns. 196. *Holden* v. *Dakin*, 4 Johns. 421. *Hart* v. *Wright*, 17 Wend. 267, and 18 Wend. 449.

In this Commonwealth, a bill of parcels is held to be a warranty that the article is what it is therein described to be, if the buyer had no opportunity to examine it; and the cases have gone no further. *Winsor* v. *Lombard*, 18 Pick. 57. *Hogins* v. *Plympton*, 11 Pick. 97. *Hastings* v. *Lovering* 2 Pick. 220. And the fact that the article is so manufactured as to deceive good judges, seems not to alter the law of the case. *Welsh* v. *Carter*, 1 Wend. 190.

Whiting, for the plaintiffs. As a general rule, there is an implied warranty, aside from the bill of parcels, that manufactured articles are reasonably fit for the purposes for which they are bought, and are of the kind described. *Laing* v *Fidgeon*, 6 Taunt. 108. *Holcombe* v. *Hewson*, 2 Campb. 391. *Gardiner* v. *Gray*, 4 Campb. 144. *Bluett* v. *Osborne*, 1 Stark. R. 384. *Gray* v. *Cox*, 4 Barn. & Cres. 115. *Jones* v. *Bright*, 5 Bing. 533. *Brown* v. *Edgington*, 2 Scott N. R. 496. *Smith* v. *Marrable*, 11 Mees. & Welsb. 5. There is an exception to this rule, when an order is given for a specific chattel, which the buyer describes, erroneously believing that it will answer the purpose to which he means to put it, and the seller sends it, not knowing that it will not suit the buyer's purpose. *Chanter* v. *Hopkins*, 4 Mees. & Welsb. 399. There is, perhaps, another exception to the rule, when the fitness of an article for its intended use can be ascertained by inspection, and it is inspected by the buyer.

When there is a description of property, in an advertisement of the sale, or when a bill of sale or bill of parcels is made, there is a warranty that the articles are such as they

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are therein described. *Osgood* v. *Lewis*, 2 Har. & Gill, 495. *Bradford* v. *Manly*, 13 Mass. 139. *Shepherd* v. *Kain*, 5 Barn. & Ald. 240. *Flight* v. *Booth*, 1 Bing. N. R. 370. *Winsor* v. *Lombard*, 18 Pick. 60. *Jones* v. *Edney*, 3 Campb. 285. And the judge ruled rightly, in the case at bar, that there was a warranty, by the bill of parcels which was given at the sale, and pursuant to the advertisement. *Tye* v. *Fynmore*, 3 Campb. 462. *Bridge* v. *Wain*, 1 Stark. R. 504. *Borrekins* v. *Bevan*, 3 Rawle, 23. *Yates* v. *Pym*, 6 Taunt. 446. *Hastings* v. *Lovering*, 2 Pick. 214. 2 Kent Com. (5th ed.) 479.

In several of the cases above cited, there was an examination by the buyer; but this was not held to affect the liability of the seller on the warranty implied in the written description of the articles sold.

Wilde, J. Upon the exceptions to the instructions given by the court of common pleas, several questions have been discussed by counsel, two only of which we deem material in the decision of the case. The first question is, whether when a bill of parcels is given, upon a sale of goods, describing the goods sold, or designating them by a name well understood, such a bill is to be considered as a warranty that the goods sold are what they are described or designated to be in the bill. The second question is, whether, if such a bill of parcels is generally to be so considered, the rule applies to cases where the goods were examined by the vendee, at or before the sale. On both these questions there are conflicting decisions. But as to the first question, we consider the law of this Commonwealth to be now well settled; and, as it seems to us, upon sound principles.

In *Bradford* v. *Manly*, 13 Mass. 139, it was decided that a sale by sample is tantamount to a warranty that the article sold is of the same kind as the sample. And Chief Justice Parker, in delivering the opinion of the court, refers with approbation to a decision, at *nisi prius*, of a case of a sale of cocoa, which was advertised and offered for sale as Caraccas cocoa; and it was held that the advertisement was equal to an express warranty. The sample, in the principal case, being

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a representation of the article sold, was considered as equivalent to the advertisement in the case referred to. The question was afterwards very fully considered, in the case of *Hastings* v. *Lovering*, 2 Pick. 214. In that case, it was held that the description of the article, inserted in a bill of parcels, or in a sale note, such as is used in England, was evidence that the thing sold was agreed to be such as represented, and amounted to a warranty to that effect. The words of the bill of parcels were, "sold E. T. Hastings two thousand gallons prime quality winter oil;" and the plaintiff had judgment on a declaration in assumpsit on the warranty. The doctrine laid down in that case has ever since been considered as the settled law of this Commonwealth; and it is in conformity with the modern decisions in England, Pennsylvania, and Maryland. The question was very fully considered in *Osgood* v. *Lewis*, 2 Har. & Gill, 495, and in *Borrekins* v. *Bevan*, 3 Rawle, 23. The principle maintained by these cases is, that the description contained in a bill of parcels of goods sold is evidence of the terms of the contract of sale, and so imports a warranty that the goods are the goods described, and that they substantially agree with the terms of the description. And in *Batturs* v. *Sellers & Patterson*, 5 Har. & Johns. 117, and 6 Har. & Johns. 249, it was decided that the bill of parcels, in that case, was written evidence of the contract, and could not be added to or varied by oral testimony. So in *Yates* v. *Pym*, 6 Taunt. 446, in an action on a sale note of "fifty eight bales of prime singed bacon," it was decided that the contract amounted to a warranty that it was prime singed bacon, and, being in writing, could not be added to by oral evidence. Whether these decisions are well founded as to the inadmissibility of oral testimony in such cases, we are not called upon to consider in the present case; as no evidence was offered to control or vary the description in the bill of parcels. But we do hold, that the description in a bill of parcels imports a warranty, as before remarked. It is a representation and declaration that the article sold is the article described. And what is this but an express warranty to that

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effect? To create an express warranty, the word warrant need not be used, nor is any precise form of expression necessary; but every affirmation, at the time of the sale of personal chattels, amounts to a warranty. This seems to be now settled, notwithstanding the old case of *Chandelor* v. *Lopus*, Cro. Jac. 4, as to the sale of a bezoar stone, to the contrary. It was so decided in *Osgood* v. *Lewis*, and *Borrekins* v. *Bevan*, already cited, and in *Power* v. *Barham*, 4 Adolph. & Ellis, 473; in *Shepherd* v. *Kain*, 5 Barn. & Ald. 240; and in *Freeman* v. *Baker*, 2 Nev. & Man. 446. And even in New York, where, in other respects, the doctrine in *Chandelor* v. *Lopus* is adhered to, it has been held, nevertheless, that any representation of the thing sold, or direct affirmation of its quality and condition, showing an intention to warrant, is sufficient to amount to an express warranty. It was so decided in *Chapman* v. *Murch*, 19 Johns. 290, and in *Swett* v. *Colgate*, 20 Johns. 196. To the rule of construction laid down in these cases, it was objected by Chief Justice Gibson, who delivered a dissenting opinion in *Borrekins* v. *Bevan*, that such a principle would extend to loose conversations between the vendor and vendee, in which the vendor may praise his goods, or express any opinion as to their qualities. But it is quite clear, I apprehend, that no such conversations or opinions would or could be construed as amounting to a warranty. No expression of an opinion, however strong, would import a warranty. But if the vendor, at the time of the sale, affirms a fact, as to the essential qualities of his goods, in clear and definite language, and the purchaser buys on the faith of such affirmation, that, we think, is an express warranty. In the present case, the bill of parcels affirms the article sold to be indigo. This imports an express warranty, even according to the cases in Johnson before cited, if it was so intended. And it must be so understood, there being no evidence that it was not so intended. This case, therefore, and the cases above cited, differ essentially from the cases cited by the plaintiffs' counsel, where a warranty was implied on the ground that the article sold was saleable in the market, and fit and proper for the

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purpose for which it was purchased. These two classes of cases depend on very different legal principles, as to the latter of which we do not intimate any opinion. This distinction is not noticed in the New York cases, where it has been held, that the description in a bill of parcels is no evidence of a warranty, either express or implied. Chancellor Kent, however, who delivered the opinion of a majority of the court, in *Seixas* v. *Woods*, 2 Caines, 48, the leading case in New York, expresses a doubt as to the correctness of that and subsequent decisions on this point. "There is no doubt of the general rule of law," he says, "as laid down in *Seixas* v. *Woods*; and the only doubt is, whether it was well applied in that case, where there was a description in writing of the article sold by the vendor, which proved not to be correct, and from which a warranty might have been inferred." 2 Kent Com. (5th ed.) 479.

From a review of these authorities, we think the weight of authority is manifestly in favor of the law as established in this Commonwealth; and it seems to us to be founded on sound principles. The plaintiff, therefore, is entitled to recover, unless, by the examination of the article purchased, he is to be considered as having waived his right to indemnity under the warranty. On this question also the authorities are conflicting. But we are of opinion that the examination of the article by the plaintiff, at the time of the sale, is no evidence of his intention to waive any legal right. If the spurious nature of the article might have been detected on inspection, it might have been otherwise; but we must infer, from the instruction of the court, that the jury found that the article was so disguised that the deception could not have been detected by a skilful dealer in indigo, without resorting to an analytical experiment; so that no neglect can be imputed to the plaintiff in not making a careful examination. In *Bradford* v. *Manly*, before referred to, the cocoa was examined by the purchaser before the sale, and yet the vendor was held liable on his warranty. And the like decision was had in *Tye* v. *Fynmore*, 3 Campb. 462. That was assumpsit on a sale note

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of "two tons of fair merchantable sassafras wood, in logs, at six guineas per hundred weight." The defendant was a druggist, and well skilled in articles of that sort, and the day before the sale, a specimen of the wood sold was exhibited to him, and he kept it the following night, and had a full opportunity to examine it. And upon this evidence, Lord Ellenborough decided that it was immaterial that the defendant, the vendee, was a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise his skill, having an express undertaking from the vendor as to the quality of the commodity. This is a very strong case on this point. So also is the case of *Shepherd* v. *Kain*, 5 Barn. & Ald. 240. In that case, the question depended on an advertisement of the sale of a vessel, in which she was described as a copper-fastened vessel, but with these words subjoined; "the vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever." The vessel, when sold, was only partially copper-fastened, and she was not what was called in the trade a copper-fastened vessel. The buyer, however, had a full opportunity of examining the vessel before the sale. Upon these facts, it was determined that the purchaser was entitled to damages, in an action upon the warranty, and that the words "with all faults" could only mean all faults which a copper-fastened vessel might have.

Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty, express or implied, and they, therefore, have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser.

We are therefore of opinion that the plaintiff is well entitled to judgment. Indeed, he would be entitled to recover by the law as it is held in New York; for, according to all the authorities, he had a right to rescind the contract. And, as he has returned the article purchased, he might recover in this action, on the count for money had and received, if there had been no warranty. We have, however, no doubt that the plaintiff is entitled to recover upon the count on the war-

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ranty, and that the instructions to the jury were in all respects correct. The exceptions, therefore, are overruled, and judgment is to be entered on the verdict.

PHINEHAS SPRAGUE & another *vs.* SIMON GILLETT & another.

A. and B., joint owners of part of a vessel, authorized C., another owner, to purchase their proportion of the outfits of the vessel, but did not furnish him with funds: C. purchased the outfits on a credit of six months, and gave a note therefor, as agent of A. and B., payable in six months: A. and B., not knowing that C. had purchased on credit, paid him the amount of the purchase, in two months after it was made: C. did not pay the note at maturity, and the vendor of the outfits sued A. and B. therefor, in an action for goods sold and delivered. *Held*, that he was entitled to recover

ASSUMPSIT for cordage sold and delivered. At the trial in the court of common pleas, before *Warren*, J. evidence was introduced tending to show the following facts: That in November 1840, the defendants, and Charles A. Brown, who has since died, were the owners of five eighths of the barque Creole: That the defendants, before the 30th of said November, authorized the said Brown, as their agent, to purchase their proportion of the outfits of said barque which was then fitting for a whaling voyage; but that they made no advance to said Brown: That on the 30th of said November, the said Brown, as such agent, purchased of the plaintiffs the cordage in question — the same being a necessary part of the outfit of said barque — on a credit of six months, and, as agent as aforesaid, gave to the plaintiffs a note therefor, payable in six months: That the defendants, about two months after this purchase, made a settlement with said Brown, and paid him their proportion of the outfits, with a commission for his services.

It did not appear in evidence whether Brown was or was not instructed to purchase on a credit; and there was no evidence that the defendants knew that the cordage was purchased upon a credit.

The defendants, upon this evidence, contended that they

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were not liable for the amount of the plaintiffs' claim; but the court instructed the jury that the defendants were so liable, and a verdict was returned for the plaintiffs. The defendants alleged exceptions to the said instruction.

M. S. Clarke, for the defendants. As the authority of Brown was only to purchase the defendants' proportion of the outfits of the Creole, he was their special agent, and they are not liable for his acts beyond the extent of the authority conferred on him. Story on Agency, §§ 17, 126, 127, 131. Long on Sales, (Rand's ed.) 397. *Fenn* v. *Harrison*, 3 T. R. 757. *Gibson* v. *Colt*, 7 Johns. 390. So far as can be ascertained from the evidence in the case, if Brown was authorized to buy on credit at all, it was on demand, or at two months at the furthest. The plaintiffs were bound to show that six months' credit was usual in cases like this; but they have not shown it; and the defendants insist that such credit is unusual. The evidence shows that the defendants, being ignorant that the purchase was on credit, paid Brown in two months; whereby they suffered an injury. This fact, being part of the *res gestæ*, is strong proof that Brown had no authority to buy on longer credit than two months, and also rebuts the presumption arising from the fact that the defendants furnished him with no funds before the purchase.

W. Gray, for the plaintiffs.

Wilde, J. This is an action of assumpsit for the price of a quantity of cordage purchased of the plaintiffs by the defendants' agent; and the defence is, that the agent was not authorized to make the purchase on a credit. That he was not in terms expressly so authorized is admitted; but he was authorized to make the purchase, and no funds were advanced to him, to enable him to purchase for cash. This, by implication, unquestionably authorized him to make the purchase on the defendants' credit. When an agent is authorized to do an act for his employer, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. Thus, if an agent is employed to procure a note

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or bill to be discounted, he may, unless expressly restricted, indorse it in the name of his employer, and thereby bind him. So an authority to a broker to effect a policy will authorize him to adjust a loss under the policy. Story on Agency, §§ 58 – 60. *Richardson* v. *Anderson*, 1 Campb. 43, *note*. Without doubt, therefore, the defendants' agent was authorized to purchase on credit, and to bind the defendants to pay the purchase money. This authority is necessarily implied from the admitted fact, that the agent was not furnished with any funds wherewith to pay the purchase money; and certainly he was not bound to advance his own funds, nor to become chargeable himself.

It has been objected, that a longer time of credit was allowed than was usual in like purchases, and that the defendants were thereby led to believe that their agent had paid for the cordage, and that, about two months after the purchase, they paid him the amount. There is no foundation for this objection. It is not admitted by the plaintiffs that six months was an unusually long credit in like purchases; nor would it be material, if it were admitted. The plaintiffs are not responsible for the misconduct of the defendants' agent. If the defendants have been deceived by him, their remedy is against him. That can be no defence in this action. It is not material whether the agent was authorized to give a note in the defendants' names; for, whether he was or not, the defendants are liable in this action.

Exceptions overruled.

COMMONWEALTH *vs.* PETER YORK.

When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant. WILDE, J. dissenting.

THE defendant was indicted for the murder of James Norton. His counse, at the trial, attempted to show that his

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offence was manslaughter. The evidence at the trial, so far as it relates to the questions of law hereinafter discussed, is stated in the opinion of the majority of the court, as given by the chief justice. After the case was committed to the jury, with instructions from the court, and they had been in consultation several hours, they sent to the court this question: "Were the jury instructed by the court, that the prisoner must prove provocation or mutual combat, and was not to have the benefit of any doubts on the subject?" To this question the court gave the following answer: "It is hardly possible to give a direct answer, affirmative or negative, to the question of the jury, without some explanation. The rule of law is, when the fact of killing is proved to have been committed by the accused, and nothing further is shown, the presumption of law is that it is malicious, and an act of murder. It follows, therefore, that in such cases the proof of matter of excuse or extenuation lies on the accused; and this may appear, either from evidence adduced by the prosecution, or evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and decide the fact on which the excuse or extenuation depends, according to the preponderance of evidence. Where there is evidence on both sides, it is hardly possible to imagine a case in which there will not be a preponderance of proof on one side or the other. But if the case, on the evidence, should be *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused; that is, in a case like the present, in favor of the lesser offence. But if the evidence, in the opinion of the jury, does not leave the case equally balanced, then it is to be decided according to its preponderance."

The jury found the defendant guilty of murder, and his counsel moved for a new trial, on the ground that the jury were misdirected.

R. H. Dana, Jr. for the defendant. A killing may be criminal or not criminal; and if criminal, it may be murder

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or manslaughter. From the mere act of killing, there is no presumption in nature, or from experience, that it is murder rather than manslaughter. Of all the homicides that are committed, few are found to be murders. A presumption of murder, from the mere fact of killing, is therefore contrary to reason and experience, as well as against liberty and life; and it should not be enforced without the clearest proof of its unavoidable obligation upon the court.

The question now before the court respects the burden of proof. The jury were satisfied that the prisoner killed the deceased. They were not satisfied that he killed him of malice. In this state of mind, they asked the court for the rule of law. If the court had ruled that the malicious killing was a single proposition, of the truth of which the jury must be satisfied beyond a reasonable doubt, the verdict would have been for manslaughter. But the court separated the proposition into two parts, the killing and the malice, and instructed the jury, in effect, that malice need not be proved, but was to be inferred, by a technical presumption, from the killing, and that the burden of proof was shifted upon the prisoner to disprove it. This burden was indeed lightened by requiring him to produce only a preponderance of belief, or an equilibrium, in favor of his defence. But this was *ex gratiâ*, and the principle is the same. The presumption was enforced, and the burden shifted upon the prisoner.

Burke says, "civil cases regard property. Now although property itself is not, yet almost every thing concerning property, and all its modifications, is, of artificial contrivance. The legislator therefore always, the jurist frequently, may ordain certain methods by which alone they will suffer such matters to be shown and established; because their very essence, for the greater part, depends on the arbitrary conventions of men. They make fictions of law, and presumptions of law, according to their ideas of utility. But where the subject is of a moral nature, independent of their connexions, men have no other reasonable authority than to register and digest the results of experience and observation. The pre-

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sumptions, that belong to criminal cases, are those natural and popular presumptions, which are only observations turned into maxims." This distinction between artificial and natural presumptions is recognized by the text writers; and the former are nowhere applied to criminal cases. Best on Presumptions, 18, 43, 208, 308. Wills on Circumstantial Ev. 29.

The presumption, in the present case, is purely artificial and technical. No fact can be added, like that of using a deadly weapon; for the ruling was, that the mere fact of killing supports the presumption. Nor is it a presumption of criminality only, which the law raises; for there is no doubt of the criminality of the act. The only question is as to the degree; and it is here that the law is supposed to enforce a presumption of the greater degree of guilt, rather than the less.

Suppose the jury had returned a special verdict, viz. that the prisoner killed the deceased, and that the killing was criminal, but that they had reasonable doubts whether it was malicious; could the court have entered a judgment of guilty of murder? Yet such would be the legal effect of that finding, if the doctrine of the instructions be true.

The jury were not allowed to be judges even of the facts. A fact was given to them, with an artificial weight attached to it by law, which they were not at liberty to disregard They were required to draw an inference from it, which, in their judgments, as reasoning and observing men, they never would have drawn. They do not draw it now. The law draws it. The prisoner has not had what he is entitled to, namely, the unbiassed moral conviction of the jury that he is guilty of murder.

By the instructions given to the jury, their verdict was made to depend, not upon their convictions, but upon the burden of proof, which is governed by technical rules. If a reasonable doubt arises as to the fact of killing, the identity of person, an *alibi*, or the like, the prisoner has the benefit of it. But if it arises as to the malicious intent, which is the gist of the charge, he is to be convicted of malice, whether it be or be not supported by proof, unless he rebuts the charge. But it

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has always been held, in this Commonwealth, that in criminal trials the burden of proof never shifts. *Commonwealth* v. *Kimball*, 24 Pick. 373. *Commonwealth* v. *Dana*, 2 Met. 340

It will be contended, in behalf of the government, tha. though, as a general rule, the burden of proof does not shift in criminal cases, and though a defendant is entitled to the benefit of every reasonable doubt, yet that there is an exception in the case of homicide. And the text books contain loose language that imports such an anomaly. But it is not found in any decision of a court. The history of the law of homicide accounts for the rise and transmission of this language. At an early period, if the homicide was proved, a verdict of murder was returned; and if there were circumstances of excuse, a pardon was sued out. At a later period, the punishment of murder and manslaughter was the same. Both offences were equally clergyable, before the *St.* of 23 Hen. 8; and a distinction between them was hardly recognized. So far was this true, that the nature of the prisoner's intent needed not to be alleged in the indictment. But that statute inflicted death, without clergy, upon persons convicted of wilful murder with malice prepense. Even after the degree of punishment was altered, the verdict was always for murder, if there was a felonious homicide, with a recommendation of a commutation of punishment, if there was no sufficient proof of malice prepense. A separate verdict for manslaughter was new in Elizabeth's time. 4 Bl. Com. 201. Dyer, 261. When the verdict and the punishment were the same, there was no need of strictness in the distinctions. It was enough to know, that if the killing was proved, the party was to be convicted generally. Hence a criminal intent and a felonious intent were convertible terms; and so were murder and felonious homicide. Mr. Justice Story says, "malice, in the true sense of the law, at least in all cases except that of murder, signifies no more than a wilful intent to do a wrongful act. In cases of murder, there is an accompaniment, indicative of its being used in a more intense sense — 'malice aforethought.'" *United States* v. *Taylor*, 2 Sumner, 586. The

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word malice, in all the earlier cases, meant no more than criminality. The *St.* of Hen. 8 recognizes degrees of criminality in homicides, and makes malice *prepense* the definition of murder, in contradistinction to simple malice, or mere criminality, which is equally predicable of manslaughter. This distinction has been gradually unfolded. The earlier cases use malice in the general sense. We have taken such instances and applied them to the new state of the law.

An argument against the instruction arises from the fact, that the court was obliged to make a new rule; the rule of *preponderance* and *equilibrium*. These words are nowhere to be found in the criminal law, until introduced on the trial of Rogers. 7 Met. 500. See Best on Presumptions, 257. Even if the language of the text books is to be adhered to, and proof of the killing is held to throw the burden on the prisoner, what is that burden? It is a prisoner's burden, the only burden ever put upon him by the law, that of satisfying the jury that there is a reasonable doubt of his guilt.

S. D. Parker, for the Commonwealth. The instruction to the jury was the same that was given in *Commonwealth* v. *Rogers*, 7 Met. 500; and the defendant was allowed the advantage of an equilibrium of proof, in a matter which he was bound to prove. This was more favorable to the defendant than is warranted by any case, except that of Rogers.

Generally, the rules of evidence are the same in criminal cases as in civil; and in civil cases the burden is on the party who takes the affirmative. *Phelps* v. *Hartwell*, and *Blaney* v. *Sargeant*, 1 Mass. 71, 335. *Buckminster* v. *Perry*, 4 Mass. 593. *Phillips* v. *Ford*, 9 Pick. 39. *Loring* v. *Steineman*, 1 Met. 211. When a *primâ facie* case is made by a plaintiff, the burden of proof is shifted upon the defendant, and he must prove matter of avoidance. *Gray* v. *Gardner*, 17 Mass. 189. *Attleborough* v. *Middleborough*, 10 Pick. 378. *Davis* v. *Jenney*, 1 Met. 224. See also *Powers* v. *Russell*, 13 Pick. 76.

When the law presumes the affirmative, it lies on the party who denies the fact to prove the negative. 1 Stark. Ev. 380. And it has been held, for centuries, that when a homicide is

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proved to have been committed, the law presumes it to have been malicious, and to be murder, until the contrary appears; that it is for the accused to show, satisfactorily, the circumstances which justify, extenuate or excuse, the act. 1 Hale P. C. 455. Foster's Crown Law, 255. Kelyng, 27. 1 Hawk. c. 31, § 32. 1 East P. C. 224, 340. 4 Bl. Com. 201. Roscoe Crim. Ev. (2d ed.) 20. *The King* v. *Oneby*, 2 Ld. Raym. 1493, and 2 Stra. 773. *Mitchell* v. *The State*, 5 Yerg. 340. This doctrine was laid down in the case of *Commonwealth* v. *Phillips*, tried in this court in 1817, as appears in a pamphlet report thereof, p. 45; also in *Commonwealth* v. *Knapp*, 10 Pick. 484. In *Commonwealth* v. *Dana*, 2 Met. 329, the same rule was applied in the case of a minor offence.

G. W. Phillips, in reply. The government is bound to prove the homicide, and that the defendant committed it, and that he did it maliciously. If there be any reasonable doubt on either point, the defendant is entitled to an acquittal of the charge of murder. Best on Presumptions, 267. This is clearly so, unless a presumption of law alters the case, and throws upon the defendant the burden of negativing the malice. But the counsel for the government has failed to produce a single *adjudication* that the burden is thus shifted. The *dicta* of judges and text writers, to this effect, are indeed numerous. But this was accounted for in the opening argument for the defendant, and may be further explained, by referring it to the arbitrary rules introduced by the Norman conqueror, and stated in Kelyng, 121–124, and 4 Bl. Com. 194. The case of *Commonwealth* v. *Dana*, 2 Met. 329, does not support the position taken for the government, but the contrary. It was there held that the burden of proof was not shifted. In *Commonwealth* v. *Rogers*, 7 Met. 500, the defence was insanity, and the presumption of sanity is warranted by all experience and observation. But the presumption of malice, in case of homicide, is not thus warranted. See opinions of the judges, in *The King* v. *Burdett*, 4 Barn. & Ald. 140, 149.

The opinion of a majority of the court was delivered by

Shaw, C. J. A motion has been submitted by the counsel

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for the prisoner, after conviction, for a new trial, for a misdirection in point of law, in the instructions of the court to the jury. Such a motion is of rare occurrence; and as a capital trial is by law a trial before a full court, it cannot be considered as a matter of course, and if allowable at all, it must be on occasions of real difficulty and importance.

On the present trial, after the jury had retired to deliberate on their verdict, and had been some time in consultation, they requested a further instruction of the court; and the court, after a short deliberation, gave them instructions upon the point proposed. The court, although they took as much time for consideration as the circumstances of the case then admitted, had yet little time and opportunity for reflection and the examination of authorities, and were very willing to reconsider the subject, under the light which might be thrown upon it, by the arguments of counsel and the citation of authorities. We have had the aid of a full and able argument by learned counsel, and are now prepared to state the result. It is a subject of unfeigned regret, that on a question of this extreme delicacy and magnitude, the members of the court have not been able to come to a unanimous opinion. But after a repeated examination of authorities, and the fullest discussion and interchange of opinion, we have not been able to come to such a desirable result. It has become my duty to state the opinion of a majority of the court.

In order to the better understanding of the question put by the jury, and the instructions of the court given in answer thereto, it seems proper to state briefly the course of the trial and the questions in fact submitted to the jury.

The prisoner was indicted for the wilful murder of James Norton, on the night of the 2d of July 1844, between eleven and twelve o'clock. There was plenary evidence, tending to prove that the said Norton, at the time and place stated in the indictment, received a mortal wound by a dirk knife, the blade of which had penetrated his heart, and was found, on a *post mortem* examination, broken off in the body of the deceased; of which wound he almost instantly died; and that

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this wound was inflicted by the hand of the prisoner. There was some evidence tending to show some struggle and contest between the parties, at or shortly before the time at which the mortal wound was given, and some conflicting evidence in regard to the fact and to the circumstances of such contest and struggle. The ground originally taken by the prisoner's counsel was, supposing the charge of killing to be proved, that the act was done in excusable self-defence, or, that if it was a culpable homicide, it was not done with malice, so as to make it murder, but done in heat of blood in mutual combat, or under such provocation as the law admits to be sufficient to extenuate the offence, and reduce it to manslaughter. The defence was ultimately placed mainly on the latter ground, and one of the questions submitted to the jury was, whether there existed such heat of blood in mutual combat, or such sufficient provocation, so as to reduce the homicide to manslaughter.

The question put by the jury, some time after they had withdrawn from the bar, and the answer thereto by the court, were thus: [Here the chief justice stated the question and the answer, as set forth, *ante*, p. 94.]

The motion for a new trial is made on the ground that this was a misdirection, and that the jury should have been instructed that, if there was sufficient evidence to raise a reasonable doubt, whether the homicide was malicious, or committed in heat of blood in mutual combat, or suddenly, upon adequate provocation, so as to extenuate it to manslaughter, then they should return a verdict of manslaughter. This is the question we are to consider.

In the first place, it is proper to consider what the nature of the homicide was, in the present case, to distinguish it from other species of homicide, and consider what was the nature and tendency of the evidence, upon which the instruction was prayed by the jury.

There may be cases of homicide, properly ruled murder by implied malice, when there was *no intention* to take the life of the deceased party; as where one wantonly throws timber

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from a house into a street in a populous town, regardless of consequences; or where one feloniously shoots at tame fowls, with intent to steal them, and the ball accidentally hits a man and kills him; or where one wantonly suffers a wild beast to go at large; or where one rides an unruly horse into a crowd; or where a mother exposes her infant child in a garden, and it is killed by a kite; or where the overseers of different parishes shift a pauper infant child from one parish to the other, in a contest which shall support it, until it dies of cold and hunger; or where a son wantonly exposes his sick father to the cold, so that he dies; or where a woman places her child in a hog-sty, to secrete it, and it is destroyed. All these (and many more cases, mentioned in the books, might be named,) are cases where death ensues from acts done recklessly and wantonly, under circumstances of inhumanity and cruelty, indicating a heart devoid of social duty, and fatally bent on mischief. But as the question, whether such homicide be murder or manslaughter, must depend upon the degree of carelessness, cruelty or malignity, presented by the evidence, depending upon the particular facts and circumstances, the malice must be an inference of fact from these circumstances; and if thereby a reasonable doubt exists, upon the evidence, whether the fact of malice is proved, a jury may be properly instructed to return a verdict of manslaughter. But the case, to which the rule we are now considering applies, is one where the life of the deceased has been taken by the accused, by a voluntary act, a wound inflicted with great violence, with a deadly weapon, and upon a vital part.

The distinguishing characteristic of murder is homicide with malice aforethought, express, or implied by law. The effect of the rule presented to the jury was, that if it was proved, beyond reasonable doubt, that the defendant had wilfully and voluntarily inflicted a mortal wound upon the deceased, malice was to be inferred from this act, unless such facts were proved, by a preponderance of the evidence, as would extenuate the homicide and reduce it to manslaughter. This rule seems to rest on well settled principles, and to be supported by a great weight of authorities.

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A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life, or do him some great bodily harm, is a necessary conclusion from the act.

But, however suddenly any act is done, the intent to do it precedes the doing of it, and the act is done in pursuance of the intent and formed design. However short the interval, the intent necessarily precedes. This is manifest from the ordinary case of a mortal blow given, with a deadly weapon, immediately upon words of provocation. Words, however aggravating, not being considered a sufficient provocation to extenuate the offence to manslaughter, it is uniformly held to be murder, an act done with malice prepense; and it is not the less preconceived, because the act immediately followed the guilty intent. There was obviously no intent to do the act of violence, until the provocation was offered; and although it is said that the act of resentment follows *immediately*, yet such is the rapidity with which the mind operates and forms its purposes, and so instantaneously does the hand execute the purposes of the will, that the moment which intervenes is sufficient for the operation of the malignant motive. Otherwise, the suddenness of the mortal blow, on provocation however slight, must exclude the implication of malice. But the law, in such cases, does impute malice to the act, because it does not consider the weight of the provocation such as

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naturally to arouse so violent a resentment; and as an act so violent and cruel cannot be attributed to a natural resentment, incident to the infirmity of human nature — on which ground alone it can extenuate the homicide — it is necessarily attributed to malignity of heart.

Malice, in the definition of murder, is imputed to an act done wilfully, *malo animo*, an act wrong in itself, injurious to another, and for which there is no apparent justification or excuse. Such justification or excuse must depend on the existence of facts; and such facts must be proved and found, in order to be the basis of any judicial decision. The wilful and voluntary act of destroying the life of another is an act wrong and unlawful in itself, injurious in the highest degree to the rights of another, being the greatest wrong which can be done to him, contrary to the laws of nature as well as society, and in violation of the plainest dictates of conscience. The natural and necessary conclusion and inference from such an act wilfully done, without apparent excuse, are, that it was done *malo animo*, in pursuance of a wrongful injurious purpose, *previously*, though perhaps suddenly, formed, and is therefore "a homicide with malice aforethought," which is the true definition of murder. And it appears to us, that this is not a forced, arbitrary, technical or artificial presumption of law, but a natural and necessary inference from the fact. This will be more apparent from considering what malice, in legal contemplation, is, and how it is inferred from illegal and wrongful acts, in other cases of crimes and offences of less magnitude.

Malice, although in its popular sense it means hatred, ill will or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrong and unlawful motive or purpose; the wilful doing of an injurious act without lawful excuse.

Mr. Justice Bayley, in giving the opinion of the court in *Bromage* v. *Prosser*, 4 Barn. & Cres. 255, though on a subject widely different from homicide, thus gives the legal description of malice, in contradistinction to the popular sense, in

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which the term is commonly used: "Malice, in common acceptation, means ill will against a person; but in its legal sense it means, a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice because it is intentional and without just cause or excuse." This is sometimes called malice in law, in contradistinction to malice in fact, because the law draws the inference from the fact. So, in civil actions, and prosecutions for minor offences some authorities in our own books, and in recent cases, illustrate this legal doctrine of malice. In *Wills* v. *Noyes*, 12 Pick. 324, the court charged the jury that legal malice might differ from malice in the common acceptation of the term; that to do a wrong or unlawful act, knowing it to be such, constituted legal malice. This was affirmed by the whole court, who say, that whatever is done, "with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, constitutes legal malice." So, in a more recent case, *Commonwealth* v. *Snelling*, 15 Pick. 340, the court, after noticing the legal and popular meaning of the term "malice," say, "in a legal sense, any act done wilfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." See also Foster's Crown Law, 256; Russell on Crimes, (1st. ed.) 614, *note*.

These instances, taken from cases having no analogy to the crime of homicide, are adduced to show, that the presumption of malice, from a wrongful and injurious act wilfully done, when applied to homicide, is not technical, or artificial, or invented for the particular occasion, but is the result of a mode of legal reasoning which is of general application.

The same doctrin is laid down, as the undoubted law of

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England, in a recent work of good authority, frequently republished and in extensive use in this country; 2 Stark. Ev. 903; in which the writer states the general doctrine I have been stating, that "malicious" imports nothing more than the wicked and perverse disposition with which the party commits the act; and he illustrates the general proposition by a reference to this presumption of malice in the case of homicide. His words are: "the application of the term 'malicious' is strongly illustrated in the case of homicide, where the *malus animus*, which brings the offence within the denomination of wilful murder, is frequently to be collected by the court, as a matter of law, from the circumstances of the case, and is not an inference of fact to be drawn by a jury, as it must necessarily be whenever malice consists in the *specific intention* actually existing in the mind of the agent, at the time of the act." And it is remarkable that Mr. Greenleaf, whose recent treatise on evidence is to be regarded rather as a discussion and statement of the grounds and principles of the theory of proof in general, than as a detail of the rules of evidence, puts forth this same presumption of malice, not as an arbitrary or technical rule, but as a natural inference, drawn by a fair course of reasoning, from the laws of nature, the experienced course of human conduct and affairs, and the connexion usually found to exist between certain things, and, in this respect, standing upon the same footing as inferences from the known laws of nature. He adds, "the general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application." 1 Greenl. on Ev. § 14. He then distinguishes between those which are conclusive, and not capable of being rebutted by proof, and those which are disputable, and may be overcome by opposing proof. Of the latter, the following

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is the illustration: "Thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the fact is thrown upon the accused." § 34.

I shall have occasion, hereafter, to state more fully that the term "deliberate," as used in the first of these passages, does not, in its legal acceptation, so much import an act done after time for reflection, as a voluntary act, an act done upon motive, of purpose and design, in contradistinction to acts done in the heat of passion, a paroxysm of resentment, in which reason and choice, for the moment, have no agency. The books constantly speak, in this connexion, of a deliberate act, *however sudden.* Whereas, if deliberation implied time and reflection, a deliberate act could never be sudden. So it has been held in Pennsylvania, under a statute which requires premeditation to constitute murder in the first degree, that the intention to kill, though immediately executed, is still the true criterion of the crime, and that the intention of the party can be collected only from his words and actions. *Respublica* v. *Mulatto Bob*, 4 Dall. 146. And in various other cases under the statute, it has been decided that, where it appears from the whole evidence that the crime was, *at the moment*, deliberately or intentionally executed, the killing is murder. It is sufficient, if the circumstances of wilfulness and *deliberation* are proved, though they arose and were generated at the period of the transaction. *Commonwealth* v. *Dougherty*, 1 Browne, Appx. xviii. *Pennsylvania* v. *M'Fall*, Addison, 257.

I will add a few other authorities, to show that the inference of malice from unlawful acts is not an artificial rule of law, but a natural inference, legitimately deduced from facts admitted or proved, and that it is not peculiar to the law of homicide, but prevails in all other departments of the criminal law. In *The King* v. *Dixon*, 3 M. & S. 11, the defendant was indicted for delivering bread, mixed with unwholesome and noxious materials, as good and wholesome bread, for the use of the children of the Royal Military Asylum at Chelsea. There was a motion in arrest, for the cause, among other

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things, that the indictment did not show that the defendant intended to injure the children's health; whereupon Lord Ellenborough said "it was an universal principle, that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act, and here it was alleged that he delivered the loaves for the use and supply of the children." In *The King* v. *Philp*, 1 Mood. Cr. Cas. 263, the prisoner was charged with burning a ship of which he was part owner, the primary purpose being to defraud the underwriters. But the evidence not being produced to prove the fact of insurance, that intention was not proved. But there were counts charging the accused with burning the ship, of which he was also master, with an intent to injure the other part owners, and the case proceeded on them. It was argued by the counsel for the prisoner, that the intention to defraud his co-proprietors was not proved, but that a different intent was shown. But it was answered, and resolved by the court, that voluntarily setting fire to the ship, and destroying her, was a wilful act; that it tended to a destruction of the property of others; and that it was a necessary inference of law, that he intended to injure them. The case of *The King* v. *Farrington*, Russ. & Ry. 207, is to the same effect.

There is a very recent case to the same point, *The Queen* v. *Hill*, 8 Car. & P. 274. On the trial of an indictment, before Mr. Baron Alderson, the prisoner was charged with uttering a forged bill of exchange, with intent to defraud Samuel Minor. The counsel for the prisoner, in addressing the jury, submitted that, on the evidence, they ought to negative the intent to defraud, because there was evidence, as he contended, that the prisoner intended himself to take up the bill. The learned judge told the jury that the questions for them were, whether the defendant uttered the bill, as a true bill, to Minor, and whether, if he did so, he knew, when he did so, that it was forged; and he instructed them that, if they should find these two facts, then they ought to find, as a necessary

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consequence of law, that the prisoner meant to defraud. "A man," said he, "must be taken to intend the consequences of his own acts, and must intend to defraud, if he pays another a false note instead of a real one." And this decision was affirmed by the fifteen judges. See also *The King* v. *Sheppard*, Russ. & Ry. 169.

That one shall be presumed to intend the natural consequences of his own acts, was decided in the remarkable case of *The King* v. *Woodburne & Coke*, in 1722, referred to in most of the books on crown law, and reported at large in 16 Howell's State Trials, 54. The indictment was founded on the Coventry act, charging the accused with lying in wait, and attacking Edward Crispe, with a sharp and heavy instrument called a bill, with intent to maim and disfigure him; and proof of this intent was necessary to bring the case within the act. The proof was, that they conspired to murder him; struck him repeated blows, with a hedge bill, in his face and on his head, by which his nose was slit; and left him for dead; but that he afterwards recovered. The ground taken by Coke was, that the act was done, not with an intent to disfigure, but to murder. But it was answered and resolved, that striking a man in the face with such a weapon, with an ultimate purpose of murdering him, had a direct tendency to maim and disfigure him, and therefore he must have intended that result; and he was convicted and executed.

I shall now consider the more direct question, whether the instruction to the jury, in the present case, was right and conformable to law. As a preliminary to this inquiry, we must first ask where we are to look for the governing rules and principles of law on this subject. The statute of the Commonwealth provides that murder shall be punished with death; and it prescribes a milder, but still a severe, punishment for manslaughter. But our statutes nowhere define murder or manslaughter. They do not declare what act shall constitute either of the offences, nor what acts of homicide shall be deemed justifiable or excusable. We are then obliged to seek for these rules and principles in the common law. Our Eng-

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lish ancestors, on their first settlement of a colony here, as it has been significantly expressed, brought the common law with them, and claimed it as their birthright, so far as it was applicable to their state and condition. After the establishment of a new form of government, by the grant of the provincial charter, in 1692, one of the first acts of the new government was, to continue in force all the local laws made under the colonial government. And, as we continued to be English subjects, the laws of England, with some modifications, continued in force till the revolution. And by our present constitution, part 2, *c.* 6, art. 6, it is declared, that "all the laws which have heretofore been adopted, used and approved, in the province, colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution." These provisions have effectually adopted the rules and principles of the common law of England, as the laws of this Commonwealth, so far as they are applicable to our condition, and given them an authoritative and binding force and effect. To this great storehouse of learning and intelligence we must resort, as well for the rules and principles of law, as for the precedents, forms and modes of practice, as they existed at the time of our revolution, and not since otherwise provided for by statute. As this is an unwritten law, we must seek for the evidence of it in judicial records, precedents and decisions, and those digests, treatises and commentaries, of learned and experienced men, which have acquired respect and confidence by long usage and general consent. If we consult English decisions made since the revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law, by men of great experience and judgment in the knowledge and application of the same laws which we are seeking to expound. And if we read the digests and treatises of reputable authors, published since we ceased to be English subjects, it is because they contain the

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authentic records of the precedents and judicial proceedings, which furnish the evidence of the common law. In like manner, the decisions of courts of other States, having the same common origin, and deriving their laws from the same common source, are valuable and useful, in enabling us the more clearly to understand, and the more fitly to apply, the rules and principles of our own authoritative code of laws.

With these views of the sources of inquiry to which it is necessary to resort, I will proceed to the investigation. I will, in the first instance, cite the rule as laid down by Sir Michael Foster, an eminent judge of the highest court of criminal jurisdiction, many years before our revolution, when the people of Massachusetts were under English jurisdiction. He was also a most acute, discriminating and exact writer, whose chapter on the law of homicide has been a work of standard authority on that subject, for a century. Sir William Blackstone says of him, that he was a very great master of the common law. In a case of great public interest, in which a *habeas corpus* had issued from the court of king's bench, to obtain the discharge of the Lord Mayor of London, who had been committed to the tower of London, by the house of commons — a case involving critical questions in regard to the liberty of the subject and the power of the commons — Lord Chief Justice De Grey delivered his opinion, in which the other judges concurred, refusing to discharge the party and remanding him to the tower. On that occasion, citing, among others, the opinion of Mr. Justice Foster, in support of his opinion, he speaks of him as one "who may be truly called the *magna charta* of liberty of persons, as well as fortunes." 3 Wils. 203. His work was cited at large by the court, and apparently relied on, as authority for a very important point of law, in the case of *Commonwealth* v. *Knapp*, 9 Pick. 517.

The rule is thus stated in Foster's Crown Law, 255: "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth

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the fact to have been founded in malice, until the contrary appeareth. And very right it is that the law should so presume. The defendant, in this instance, standeth upon just the same ground that every other defendant doth; the matters tending to justify, excuse or alleviate, must appear in evidence, *before he can avail himself of them.*"

As this was not a judicial opinion, given in the actual administration of justice, it may become necessary to trace it to an earlier source.

Lord Coke, in 3 Inst. 47, having described murder as homicide, "with malice forethought, either expressed by the party or implied by law," proceeds, in p. 51, thus to define malice prepensed: "Malice prepensed is when one compasseth to kill, wound or beat another, and doth it *sedato animo.* This is said in law to be malice forethought, *prepensed, malitia præcogitata.*" Here, perhaps, the same remark may be made on the word "*sedato*" which was before made on the word "deliberate;" that it rather denotes an act done in pursuance of a motive, with an intent and formed design, in contradistinction to an act done in an ebullition of anger, in which reason and judgment are for the moment suspended. But whether or not this is the true meaning intended to be expressed by Lord Coke, I think it is made clear, by his definition of implied malice, on the next page. "First in respect of the manner of the deed. As, if one killeth another without any provocation of the part of him that is slain, the law implieth malice; whereof you may read in *Mackalley's case,*" 9 Co. 67 *b.*

Mackalley's case was heard before all the judges, on a special verdict, on an indictment of several persons for the murder of a civil officer. Many points were considered and adjudged, and it is difficult, without making too large an extract, to state the exact point decided on this subject. But I understand it to be stated by Lord Coke, as decided by all the judges and barons, that "if one kills another without provocation, and *without any malice prepense which can be proved,* the law adjudges it murder, and implies malice; for by the law of God every one ought to be in love and charity with

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all men; and therefore, when he kills one without provocation the law implies malice, and he may be indicted generally, that he killed of malice prepense; for malice implied by law, given in evidence, is sufficient to maintain the general indictment." This case, decided in the reign of James I., on great consideration, by all the judges, appears clearly to decide the point, that if the *fact* of killing is proved, and on this proof o. the homicide no excuse or extenuation appears, no other proof of malice need be given; the malice is proved by the act, and a conviction of murder must necessarily follow. It is an act done *malo animo*, and without excuse or justification which can be proved.

In the above statement, the case of a killing without provocation is put. But I think it will manifestly appear, from a great variety of cases, that this is equivalent to saying, that it is where no provocation appeareth; where none is proved; on the well known rule, that facts alleged, but not proved, are considered, for all judicial purposes, as not existing. This is established by *Legg's case*, Kelyng, 27. One John Legg was indicted for the murder of Robert Wise. "It was upon the evidence agreed, that if one kill another, and no sudden quarrel appeareth, this is murder, as in *Mackalley's case*, 9 Co. 67 *b*. And it lieth on the party indicted to prove the sudden quarrel." This was affirmed in the leading case of *The King* v. *Oneby*, 2 Ld. Raym. 1485, and 2 Stra. 766. It was argued on a special verdict, before all the judges, in the year 1727, and their unanimous opinion was delivered by Lord Raymond, C. J. The case is too long to cite, but I will state several points decided, bearing upon the present question. On the subject of implied malice, it was held, that "killing a man, without a provocation, is murder; as if A. meets B. in the street and immediately runs him through with a sword, or knocks out his brains with a hammer or bottle." One objection to the verdict was, that the homicide was upon a sudden quarrel, and so but manslaughter; whereupon the court stated the rule thus: "In answer to this objection, I must first take notice, that where a man is killed, the law will not presume that it

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was upon a sudden quarrel, unless it is proved to be; and therefore in *Legg's case*, it was agreed upon evidence, that if A. kills B., and no sudden quarrel appears, it is murder; for it lies upon the party indicted to prove the sudden quarrel."

There is another view of the subject, which appears to me to lead strongly to the same conclusion. I allude to the cases of special verdicts and judgments thereon. It is a settled rule, and was so laid down in *Oneby's case*, to which all the judges agreed, that the court are judges of the malice, and not the jury; and that the court are also judges of the facts found by the jury, whether, if the quarrel was sudden, there was time for passion to cool, or whether it was deliberate or not. It is an equally well settled rule, that if, upon all the facts, found and returned by the jury, in a special verdict, the accused may be not guilty, the court will take nothing by intendment, and are bound to pronounce him not guilty.

If the fact of killing did not necessarily imply malice, and exclude the inference of heat of blood on provocation or in mutual combat, then it would follow that, after the fact of killing is found, if the jury do not negative such fact of provocation or mutual combat, it would still be left equivocal, whether the homicide was upon malice or heat of blood, and the court could not render a judgment as for murder. But it is believed, that in *Mawgridge's case*, Kelyng, 119, and in *Oneby's*, and many other instances of special verdicts, the jury do not in terms find that the homicide was of malice, nor do they return, negatively, that there was no provocation or sudden quarrel. They return the facts; of course, the *facts proved, and no others*. If, upon these facts, the court conclude that there was a homicide with malice, judgment is entered for murder; because, whether malicious or not is matter of law. So if, upon the verdict of the jury, no fact of provocation or sudden quarrel appears, it is because no such fact was proved to their satisfaction. The reason why the court are bound to render judgment for murder, when the verdict neither finds nor negatives the fact of provocation or sudden quarrel, is, that in the absence of proof of these facts, the law presumes

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malice, from the act of killing, unless the matter of excuse or extenuation affirmatively appears; and unless it does so appear upon the proof in support of the provocation, it must be proved by the accused; otherwise it will not appear at all. It follows, therefore, that in such case, if the accused does not or cannot offer proof of such fact, satisfactory to the jury, his defence on that ground must fail. This is clearly stated by the court in *Oneby's case*, in 2 Ld. Raym. 1494, where the court say, "although there are many special verdicts in indictments for murder, there never was one where the jury find, in express terms, that the act was done with malice, or was not done with malice prepense, or that it was done upon a sudden quarrel and in transport of passion, or that the passion was cooled, or not cooled, or that the act was deliberate, or not deliberate; but the collection of those things from the facts found is left to the judgment of the court." *Holloway's case*, Palm. 545. Cro. Car. 131. W. Jon. 198. So in another passage in the same opinion, being a comment upon *Legg's case*, before cited, it is said, "if A. kills B., and no sudden quarrel appears, it is murder; for it lies on the party indicted to prove the sudden quarrel; and therefore the jury not having found any such thing for the prisoner's benefit, it is to be took there was no such."

From this view of the immemorial usage of the courts, upon special verdicts, it appears manifest that the fact of killing is *primâ facie* evidence of malice, and unless overcome by preponderating proof the other way, it must be held murder, and judgment go accordingly.

This view of the law of homicide, showing how a judgment must be rendered upon a special verdict which finds, in terms, neither the fact of malice nor the fact of provocation or sudden quarrel, (including, of course, the nature and incidents of such provocation or quarrel,) in extenuating the homicide, leads to the consideration of another part of the direction to the jury, excepted to by this motion. This direction was, that if, in their opinion, the proof preponderated against the conclusion that there was mutual combat, although they

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might entertain some doubts, then the extenuation was not proved. The argument against this proposition is this, that as it is a maxim of the criminal law, in favor of life, of innocence, and of immunity from punishment, that the guilt of the accused must be proved to the full satisfaction of a jury, and if they have reasonable doubts on the subject, the defendant ought to be acquitted; then if the proof of the fact of extenuation is such as to raise a reasonable doubt, whether there was not such sudden quarrel as to extenuate the homicide, the jury ought to find a verdict for the lesser offence; otherwise the defendant might be convicted of the higher offence, whilst in fact the jury would have doubts whether he was guilty of it. This is putting the objection strongly, and it is certainly entitled to a respectful consideration. But we think it is not well founded. The maxim is certainly a humane and a sound one, and constantly practised on, that guilt must be proved beyond reasonable doubt. In the language of that humane judge, Lord Hale, *tutius semper est errare in acquietando quam in puniendo; ex parte misericordiæ, quam ex parte justitiæ.* But we think the argument drawn from it, on this occasion, is not valid. It is the guilt of the accused, which is to be proved to the satisfaction of the jury, and beyond reasonable doubt. Now if we are right in the main point, which we have been endeavoring to establish, his guilt is proved by proof of the act of voluntarily killing another, without excuse or justification apparent upon the proof offered in support of the prosecution. Unless this fact is proved beyond reasonable doubt, unquestionably the defendant is entitled to an acquittal. But when this is proved beyond reasonable doubt, the guilt of malicious homicide is proved beyond reasonable doubt, and the humane maxim of law is not violated. But it is in favor of life and innocence, that this maxim of criminal law, in the application of evidence, has been adopted; and therefore it was, that in the other branch of the instruction, the court directed the jury to find for the prisoner, if, in their opinion, the proof *preponderated* in favor of the fact of sudden and mutual combat. Proof beyond reasonable doubt is necessary to

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establish a fact against the accused; but preponderating proof — proof sufficient to satisfy a jury of the fact — is sufficient to establish a fact in his favor. But it must go to this extent; otherwise there is nothing on which the jury can found their belief, and warrant them in considering the fact proved. It is not sufficient, therefore, to raise a doubt, even though it be a reasonable doubt of the fact of extenuation; simply because it is no *proof* of the fact. And here, again, we think the point may be illustrated by considering how the case would stand on a special verdict. Supposing the jury were to find, in the usual form, that the accused made the felonious assault on the deceased with a dangerous and deadly weapon, called a dirk knife, and therewith gave him one mortal wound, of which he instantly died, in manner and form, &c.; and should also return, that there was some evidence tending to prove that said wound was given in heat of blood, during a sudden and mutual combat; but that the proof of such fact did not preponderate over the proof against it, though it raised some doubt in their minds. It seems to us that it must be then considered that the matter of extenuation was not proved; and then, as in very many precedents, the judgment of the court must be against the prisoner, for the higher offence. And yet that would be precisely similar to the present case, with this difference, that, in this case, the jury were directed to draw the inference as they should find the fact upon the proof; whereas, in the case supposed, the inference would be drawn by the court, on the same state of the case on the record.

I am aware that Lord Holt, in his elaborate opinion, in *Mawgridge's case*, Kelyng, 119, in some introductory remarks, states the ancient law in regard to murder and homicide, in the time of the Danes, and afterwards of the Normans, in which certain arbitrary presumptions were, by express enactment, to be raised. Homicide was not then considered murder, unless it was secret. Among other extraordinary provisions, it is stated that, before the statute of Marlbridge, as the law stood or was interpreted, if a man was found to be

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slain secretly, it was always intended, 1st, that he was a Frenchman; 2d, that he was killed by an Englishman; 3d, that the killing was murder; and 4th, that if any one was apprehended to be the murderer, he was to be tried by fire and water, (i. e. by ordeal,) though he killed him by misfortune; which was extended beyond reason and justice, in favor of the Normans. These are undoubtedly cases of mere arbitrary presumptions, for the security of despotic power, rather than the dictates of reason and justice. But they are mentioned rather as curious matters of remote antiquity, explaining the origin of the word "murder," than as the basis or origin of any modern rule of law. And Lord Holt, in the same opinion, adds: "It appears, that since the time of Bracton," (who had described murder to be distinguished from manslaughter only by being done secretly, *clanculo*,) "the notion of murder is much altered, and comprehends all homicides, whether privately or publicly committed, if done by *malice prepensed*." In the same elaborate opinion, Lord Holt states the law, it is believed, as it is now understood and practised. "Malice," he says, "is a design formed of doing mischief to another; *cum quis data opera male agit*, he that designs and useth the means to do ill is malicious." "He that doth a cruel act voluntarily doth it of malice prepensed. If one doth such a mischief on a sudden, that is malice prepensed; for, saith my Lord Coke, if it be voluntarily, the law will imply malice. Therefore, when a man shall, without any provocation, *stab another with a dagger*, or knock out his brains with a bottle, this is express malice; for he designedly and purposely did him the mischief. This is such an act that is malicious in the nature of the act itself, if found by a jury, though it be sudden, and the words *ex malitia præcogitata* are not in the verdict." Kelyng, 127.

And in the opinion of the judges, in *Oneby's case*, in 1727, 2 Ld. Raym. 1487, they say, "without entering into a nice examination of the several definitions or descriptions of murder, as they are found in the old law books of Bracton, Britton and Fleta, where the wickedness of the act is aggravated by the

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circumstances of secrecy or treachery; murder has been long since settled to be the voluntary killing a person of malice prepense, and that whether it was done secretly or publicly."

An instance of arbitrary presumption, created by positive law, by an English statute, designed to prevent the growing evil of infanticide, in certain cases enacted that, if a woman should conceal the birth of her bastard child, and afterwards the child should be found dead, it should be presumed that the child was born alive, and that she killed it. This statute was afterwards repealed.

But if we are right in tracing the principle and the true ground of the rule, which seems to be so well established by authority, it is not like an artificial presumption, established by positive law, on considerations of policy; nor like an arbitrary edict of an invading sovereign, jealous of his newly conquered and still exasperated subjects; but an instance of an inference, drawn by correct reasoning, from facts proved, which must stand until controlled or rebutted by some other fact proved. That such is the principle and foundation of this rule, I have offered some standard authorities to prove; and it remains only to show how uniformly this rule has been repeated, and enforced and acted upon, both by judges, and text writers of established authority.

I have already cited the leading passage in Foster's Crown Law. But the principle is recognized, rather than formally stated, in various passages of that work. "I have already premised, that whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of his jury. The presumption of law is against him, till that presumption is repelled by contrary evidence." p. 290. And again, in p. 313: "for all voluntary felonious homicide without a provocation is undoubtedly murder."

Lord Hale says, "when one voluntarily kills another without any provocation, it is murder; for the law presumes it to be malicious, and that he is *hostis humani generis*." 1 Hale P. C. 455. In 1 Hawk. c. 31, § 32, it is laid down, that "wherever it appears that a man killed another, it shall be

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intended, *primâ facie*, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, &c." In 4 Bl. Com. 201, it is said, "we may take it for a general rule, that all homicide is malicious, and of course amounts to murder, unless where justified, excused, or alleviated into manslaughter; and all these circumstances of justification, excuse or alleviation, *it is incumbent upon the prisoner to make out* to the satisfaction of the court and jury; the latter of whom are to decide whether the circumstances alleged *are proved* to have actually existed; the former, how far they extend to take away or mitigate guilt." In 1 East P. C. 224, 340, it is laid down, that "the fact of killing being first proved, the law presumes it to have been founded in malice, unless the contrary appear; and all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. Upon the truth of these facts, so alleged, the jury alone are to decide; but whether, taking them to be true, the homicide is justified, excused or alleviated, is matter of law, upon which the jury ought to be guided by the direction of the court." The law is stated, in nearly the same terms, in 1 Russell on Crimes, (1st. ed.) 614–616. It is there said, that "it is incumbent upon the prisoner to make out such circumstances" of alleviation, &c. The following books are to the same effect. Bac. Ab. Murder, C. 2. 2 M'Nally, 546. 2 Stark. Ev. 948. Archb. Crim. Pl. (1st. ed.) 212, 213. 3 Chit. Crim. Law, (4th Amer. ed.) 727. Roscoe Crim. Ev. (2d ed.) 20, 653. 1 Gabbett Crim. Law, 455.

In *The Queen* v. *Kirkham*, 8 Car. & P. 116, 117, Coleridge, J. says, "as soon as it is ascertained that one individual, in the possession of his reason, has wilfully taken away the life of another, the law's first presumption is, that the party is guilty of murder." "The law requires from him and will allow him to show that there were some mitigating circumstances, which alter the presumed character of the act."

I will cite only one other recent English case, to show how uniformly this rule of law is applied there, in like cases. In

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The King v. *Greenacre*, 8 Car. & P. 35, the question was whether the offence was murder or manslaughter. The homicide was committed in secret. Lord Chief Justice Tindal told the jury thus: "There are several principles of law relating to this subject, one of which is perfectly clear, viz. that, where it appears that one person's death has been occasioned by the hand of another, *it behoves that other to show* from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder."

This rule has been adopted and sanctioned, almost in the same terms, in this Commonwealth, and in several of the States. In *Commonwealth* v. *Phillips*, in this county, in the year 1817, Parker, C. J. thus laid down the law: "When a homicide is committed, the law implies malice. It is incumbent on the person who committed it to prove the absence of malice, by evidence produced in his defence; or the proof may arise out of the evidence on the part of the government" Pamphlet report of Phillips's trial, p. 45.

So in New York; *The People* v. *McLeod*, 1 Hill, 436; and in New Jersey. *The State* v. *Zellers*, 2 Halst. 243. So in Pennsylvania, by the common law. *Pennsylvania* v. *Honeyman*, *Bell*, *McFall* and *Lewis*, Addison, 148, 161, 257, 282. Since the statute of that State, passed in 1794, the burden of proof is on the government; and unless the circumstances of malice are proved, it is murder only of the second degree. 1 Whart. Dig. (4th ed.) 327.

I have thus endeavored to establish the proposition, and it seems to be most abundantly proved, that when the fact of voluntary homicide is shown, and this not accompanied with any fact of excuse or extenuation, malice is inferred from the act; that this is a fact which may be controlled by proof; but the proof of it lies on the defendant; and if not so proved, it cannot be taken into judicial consideration. This is expressed in a variety of forms, a variety so great as to preclude the supposition that it depends upon a form of words or mode of expression transmitted by one writer or jurist to another but

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recognized, for a long series of years, as a rule of judicial decision founded on the principles of evidence and confirmed by a long course of practice.

In *Legg's case*, the words are, "*it lieth upon the party indicted* to prove the sudden quarrel." So in *Oneby's case*, "where a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved so to be." Foster says, the defendant "must *prove* his case to the satisfaction of his jury. The presumption of law is against him, *till it is repelled* by contrary evidence." Blackstone says, "it is *incumbent on the prisoner* to make out," &c. East says, the circumstances "are to be satisfactorily *proved by the prisoner*." Starkie says, the defendant "must *prove* his case." Coleridge, J. says, "the law *requires from him to show*," &c. Tindal, C. J. says, "*it behoves him* to show," &c.

These various expressions we consider as meaning substantially the same thing. Now, whether it be regarded as a presumption, to be rebutted by proof, or a change of the burden of proof, or an inference of fact, to be controlled or disproved by evidence, as applied to this subject, it makes little difference. It is evidence of malicious homicide, which must have its effect, until the malice is disproved by satisfactory proof of circumstances of extenuation. It is hardly necessary to cite authorities to the very familiar principle, that when a fact is to be proved, it must be by evidence sufficient to lead a jury to believe it to be true; and that, for this purpose, it must outweigh or overbalance the evidence which it is brought to control. I will simply allude to two recent cases of great interest, in this court. In *Commonwealth* v. *J. F. Knapp*, 9 Pick. 496, the prisoner was charged with aiding and abetting in the murder of Mr. White. The proof tended to show that the prisoner conspired with the perpetrator of the murder, and was in a situation to afford encouragement and assistance, though standing at some distance from the scene. The court instructed the jury, that if the prisoner was one of the conspirators, and in a situation to afford some assistance, it would follow, as a legal presumption, that he was there to carry into

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effect the concerted crime; and that it would be for the prisoner to *rebut that presumption*, by showing to the jury that he was there for another purpose.

In *Commonwealth* v. *J. J. Knapp*, 10 Pick. 484, the principle is laid down more explicitly. The prisoner was charged as accessory before the fact to the same murder; and it became necessary to prove the conviction of the principal. The record was offered for that purpose and objected to. The court admitted it as *primâ facie* evidence, saying, "it may be rebutted by showing that there was no murder, or that Francis was not in a situation where he could take a part as a principal. The prisoner has the burden of proof. He must show the jury that Francis ought not to have been convicted. He is not to make the propriety of the conviction *questionable* merely; he must prove it to have been clearly wrong."

These cases, it is believed, were deliberately tried, and the rules of law laid down in them were much considered; and the passages I have cited are directly in point. In both cases, it was held, that where a presumption against the accused was established, or a *primâ facie* case made, it must stand as a fact proved, till overthrown by proof of the contrary. In the last case, proof of murder committed, and the prior conviction of the principal, were essential averments to be proved; but the record of the conviction was held *primâ facie* evidence of that murder, unless proved by the defendant to be wrong. Proof making it *questionable* would be insufficient.

This is precisely conformable to the direction, in the case at bar, that when the state of the proof is such, that it becomes necessary for the accused to take on himself the proof of a fact, it will not be sufficient to make it doubtful or questionable; it must preponderate.

When it is said that the proof lies on the accused, it is not to be understood that the evidence must be adduced or offered by him; he may avail himself of all the evidence, on both sides, whether produced by himself, or coming from the other side on direct or cross examination. The true meaning is, that the accused takes the responsibility of that fact, and if the

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proof does not sustain it, the legal conclusion is that it is not true, and he cannot have the benefit of it, as a fact proved.

If it be still insisted, that conformably to this course of reasoning, a person on trial may be convicted of the higher offence when the jury have doubts whether he ought to be so convicted, we think the answer is obvious. The crime, the *corpus delicti*, is to be proved beyond reasonable doubt; otherwise the accused is entitled to an acquittal. The jury must be so instructed, and were so instructed in the present case. If the homicide was proved beyond reasonable doubt, and no fact of extenuation came out with the proof of the homicide, (and we are now so to presume,) then the offence of which the party was convicted was proved beyond reasonable doubt, and the doubt arises only in regard to a fact which was alleged by the accused in extenuation, but not proved. This would, perhaps, appear more clear, in a case where there is no medium between acquittal and conviction, as there is in homicide, by a verdict of manslaughter. Suppose a party indicted for manslaughter, and that the defence should be excusable self-defence. Suppose the fact of killing should be clearly proved, but an attempt to prove a previous violent attack upon him by the deceased should fail, although the evidence might tend to raise some doubt whether there was not such previous attack. The conviction, in such case, must rest on proof establishing the *corpus delicti* beyond reasonable doubt, although the whole evidence would raise a doubt, whether there had not been such previous attack. The proof establishing the necessity for such taking of life, in self-defence, must be satisfactorily made out. Raising a doubt would be insufficient.

So in *J. J. Knapp's case*, the jury might have entertained great doubts of the correctness of the conviction of the principal; but being established by proof, sufficient until met by proof sufficient to prove it incorrect, the jury were rightly directed to convict him, because such proof was not given.

The other branch of the direction given to the jury, that in case of the proof being equal, the presumption of innocence would turn the rule in favor of the prisoner, was favorable to

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the accused, and could not be and has not been objected to by him. It may deserve a fuller consideration, when it again arises.

On the principal question, upon the fullest consideration we have been able to give it, on this revision, a majority of the court are of opinion that the direction was right, and that the motion for a new trial must be overruled.

Wilde, J. I regret exceedingly that the court have not been able unanimously to concur in opinion, on the important question raised by the motion of the prisoner's counsel. In the administration of justice, it is of great importance that the law and the rules of evidence should not only be founded upon just and reasonable principles, but that they also should be clearly settled. Any uncertainty of the law is a great evil, and may be productive of great injustice. This is true in all cases, civil or criminal, but more especially in capital cases, when the life of a fellow-being may depend on a principle of law or a rule of evidence.

Impressed with these considerations, and with the vital importance of the question in this case, I have examined the authorities on which it depends with great care and attention; and notwithstanding my great deference to the opinions of my learned brethren, in doubtful and difficult questions, I cannot conscientiously concur in the decision now pronounced by the Chief Justice. I am unable, after the most anxious consideration of the question, to overcome the strong conviction of my own mind, that the instructions excepted to are not maintainable upon any sound principle of law, or upon any binding authority. I feel therefore in duty bound to express my own opinion, and to refer briefly to the authorities and principles of law upon which it is founded.

In my opinion, the question depends entirely upon the rule of law as to the burden of proof. If the burden of proof, throughout the trial, was on the Commonwealth, the instructions to the jury were clearly incorrect; if, on the contrary, it was on the prisoner, after the proof of the homicide as charged, he has no ground of exception; as the instructions were more favorable to him than the law requires. That the

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burden of proof was on the government, in the first instance, to prove all the essential facts alleged in the indictment, cannot be controverted; but the counsel for the Commonwealth contends, that the homicide having been proved as charged, the law presumes malice, and consequently that a *primâ facie* case for the government was fully proved, and thereupon the burden of proof shifted, and was thrown on the prisoner, to make it appear that the homicide was excusable, or was committed on such a provocation as would be sufficient to reduce the crime to manslaughter.

This argument cannot be maintained, unless the law of homicide, as to the burden of proof, is an exception to the well established rule of law in all other cases. Even in a civil suit, the plaintiff must prove all the essential allegations in his writ, beyond a reasonable doubt, or the defendant is entitled to a verdict. This just rule is of great importance in the trials of civil actions, where the evidence is doubtful; it is still more important in criminal trials, and most of all in capital trials. The *primâ facie* evidence of a case never changes the burden of proof, unless the defence is founded on the admission of the facts proved by such evidence. And in criminal cases, the burden of proof never shifts, so long as the defendant grounds his defence on the denial of any essential allegation in the indictment. For instance; if the prisoner, in the present case, had grounded his defence on the proof of an *alibi*, and the jury had doubted whether to believe the witnesses testifying to his guilt, or the witnesses testifying to an *alibi*, undoubtedly the jury would have been bound to return a verdict of acquittal, notwithstanding the government, in the first instance, had made out a *primâ facie* case by express evidence. And how can the principle vary when a *primâ facie* case is made out partly by presumption? If, on the whole evidence, the jury had a reasonable doubt of the prisoner's guilt as charged, they could not be justified in convicting him.

In the case of *Commonwealth* v. *Dana*, 2 Met. 329, the defendant was indicted for having in his possession lottery tick-

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ets, with an intent to sell or offer them for sale; and the jury were instructed that "if, from the whole evidence on the part of the Commonwealth, they were led to the belief that the defendant did sell and deal in lottery tickets, and had them in his possession for that purpose, they would be authorized to find him guilty, unless he had succeeded, on his part, as had become his duty, to explain those facts and circumstances consistently with his innocence of that unlawful intention." To this charge the defendant excepted, and the exception was overruled; but not on the ground, as was understood by the counsel for the Commonwealth, that the burden of proof was thrown on him. The court say, "this is not the meaning of the charge; for the jury were instructed that they were not authorized to find the defendant guilty, unless the evidence was such as to lead them to believe that he was guilty. The remark, that it was the duty of the defendant to explain the facts and circumstances proved against him, consistently with his innocence, meant no more than he ought so to do; but still if he failed, they were not to find a verdict against him, unless, on the whole evidence, they believed him guilty. If they doubted, they were to acquit him. So the case was left to the jury on the right footing, namely, that the burden of proof was not shifted, but still remained on the Commonwealth, to prove the guilt of the defendant; and if a reasonable doubt remained, the defendant was to be acquitted." The rule was thus laid down in *Powers* v. *Russell*, 13 Pick. 76, 77: "When the proof on both sides applies to one and the same issue or proposition of fact, the party whose case requires the proof of that fact has, all along, the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives *primâ facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and distinct proposition, which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." See

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also *Sperry* v. *Wilcox*, 1 Met. 270, and *Brown* v. *King*, 5 Met. 181. Various other authorities might be cited in support of the rule laid down in these cases; but it is unnecessary. I consider the rule of law as clearly settled; and it is founded on the plainest principle of reason and justice. Most certainly, when a party is charged with the commission of any crime, all the facts constituting the crime must be proved against him; and if, on the whole evidence, the jury have a reasonable doubt as to any one of such facts, they are bound to acquit him. The jury are sworn to give a true verdict according to the evidence; not according to the presumption of any fact, unless it is a natural and reasonable inference from some other facts proved.

In the case of *Coffee* v. *The State*, 3 Yerg. 283, it was decided, that malice being a necessary ingredient in constituting the crime of murder, if the jury had a reasonable doubt of the malicious intent with which the act was done, that doubt must weigh in favor of the prisoner; and unless removed by the government, they must acquit him. "I am of opinion," says Green, J. "that the judge should have told the jury that if, upon the whole circumstances of the case, they were satisfied of his [the prisoner's] guilt, they ought to find him guilty; but if their minds, taking all the evidence together, could not come to any satisfactory conclusion as to whether the act amounted to murder or manslaughter, they ought to find him guilty of manslaughter only."

These principles and authorities are wholly irreconcilable with the presumption of malice on which the counsel for the Commonwealth relies. No malice can be inferred from the mere act of killing. Such a presumption, therefore, is arbitrary and unfounded. Many homicides are committed in self-defence, some by accident, and many more upon a sudden provocation, or in mutual combat. How then can it be maintained, upon any just or reasonable principle, that every homicide implies malice, unless the contrary be proved beyond a reasonable doubt? Nor is such a presumption supported, as it seems to me, by any binding authority. It had its origin in

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a barbarous age, when the rules of evidence, as now established, were little known, or very much disregarded. Depositions of witnesses not permitted to be confronted with the prisoner, and written examinations of accomplices, and their confessions, proved by hearsay evidence, were all considered competent proof, by very learned judges, in the most solemn trials. Such was the unsettled state of the law, as to the admission and effect of evidence, when the presumption in question had its origin, and indeed for several centuries after. At that time, the crime of murder was confined to the secret killing of another, which the word *moerda*, says Judge Blackstone, signifies in the Teutonic language. "It was defined, *homicidium quod nullo vidente, nullo sciente, clam perpetratur*; for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated *murdrum*. This was an ancient usage among the Goths in Sweden and Denmark; and, according to Bracton, was introduced into this kingdom by King Canute, to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security to his own Normans." 4 Bl. Com. 194, 195. The same account of these ancient laws is given by Lord Holt, in *Regina* v. *Mawgridge*, Kelyng, 122. Before the statute of Marlbridge, he observes, "if a man was found to be slain, it was always intended, 1st, that he was a Frenchman; 2d, that he was killed by an Englishman; 3d, that the killing was murder; 4th, if any one was apprehended to be the murderer, he was to be tried by fire and water, though he killed him by misfortune; which was extended beyond reason and justice in favor of the Normans." These ancient laws or ordinances were abolished by *St.* 14 Edw. 3, *c.* 4; since which, murder has been defined as it now is, "without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction." 4 Bl. Com. 195. Staunf. P. C. 18. 1 Hale P. C. 447.

Such is the origin of the presumption relied on in support

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of the conviction of the prisoner; a presumption founded on no just principle, but on arbitrary ordinances which have been long since abolished, and which is opposed to a fundamental and a most important principle of the criminal law, that in all cases, where the guilt of the accused is left doubtful by the evidence, the presumption of innocence is to prevail in his favor. And so, if it be doubtful whether he be guilty of a greater or less offence, he is only to be convicted of the latter. But if the presumption of malice, from the mere act of killing, had ever any foundation in justice or sound policy, it must be confined to secret homicides, as it was originally, and cannot be extended to cases where the facts and circumstances attending the homicide are proved, and the existence of malice, from the whole evidence, is left doubtful.

On principle, this appears to me exceedingly clear; and I think there is no binding authority to the contrary. The *dicta* of judges, referred to in the digests, were extrajudicial. They are to be found in cases decided on special verdicts, where the question of malice depended upon the facts and circumstances found by the jury, from which it might or might not be inferred. Such was the decision in *The King* v. *Oneby*, 2 Ld. Raym. 1485, and 2 Stra. 766. There was no question as to the burden of proof in that case; for the question of malice was expressly decided on the facts found by the jury. The court say, that "upon the trial of an indictment for murder, the judge directs the jury thus: 'If you believe such and such witnesses, who have sworn such and such facts, the killing the deceased was with malice prepense express, or it was with malice implied; and then you ought to find the prisoner guilty of murder; but if you do not believe those witnesses, then you ought to find him guilty of manslaughter only: and so, according to the nature of the case, if you believe such and such facts, the act was deliberate or not deliberate; and then you ought to find so and so.' And the jury may, if they think proper, give a general verdict, either that the prisoner is guilty of murder, or of manslaughter. But if they decline giving a general verdict, and will

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find the facts specially, the court is to form their judgment, from the facts found, whether there was malice or not, or whether the fact was done on a sudden transport of passion, or was an act of deliberation or not." 2 Ld. Raym. 1494. From these principles it must be inferred, that whatever may have been the opinion of the court as to the presumption of malice, from the mere act of killing, in cases of secret homicides, they were nevertheless of opinion, that when there was evidence as to the manner of killing, and the facts and circumstances attending the act, the question of malice was to be decided upon those facts and circumstances, whether decided by the jury, or by the court upon the facts specially found. Now, if the jury, in the present case, had found a special verdict in conformity with the instructions of the court, it would have been, that the prisoner was guilty of the homicide charged; but whether it was committed with malice prepense, or in the heat of blood on some provocation, or in mutual combat, was doubtful, although, by the preponderance of the evidence, the crime was committed with malice. It is very clear that such a verdict could not be received, as no judgment could be rendered upon it; a material fact not having been found. And this I consider a test of the soundness of the presumption contended for in behalf of the prosecution. For if the burden of proof is on the prisoner, to reduce the crime from murder to manslaughter, and the jury find that he has failed so to reduce it by satisfactory evidence, but that the presumption of malice and the preponderating proof concur, the court would be authorized to sentence the prisoner as convicted of the crime of murder; which I hold clearly the court would have no authority to do.

If then there is any ground for the presumption in question in cases of secret homicides, there is none whatever in cases where there is evidence as to the facts and circumstances accompanying the act of killing. In all such cases, the jury are to decide upon the question of malice, according to the facts and circumstances proved. Malice is implied, says Sir Michael Foster, when the fact of killing "hath been attended with such circumstances as carry in them the

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plain indications of an heart regardless of social duty and fatally bent upon mischief." And all the authorities agree, that when such facts and circumstances are proved, the law implies malice; which certainly is a just and reasonable implication. But why is malice implied from facts and circumstances indicating a wicked and depraved heart, when malice is presumed from the mere act of killing? If the secrecy of the act may raise the presumption of malice, such a presumption has no application to cases in which the facts and circumstances accompanying the act are proved; and no case can be found, in which such a presumption has been so applied. This presumption of malice, from the mere act of homicide, is not sanctioned either by Lord Coke or Lord Hale. Lord Coke lays down the doctrine, as to the implication of malice, very fully. Malice, he says, is implied in three cases: 1st. In respect of the manner of the deed; as if one killeth another without any provocation of the part of him that is slain, the law implieth malice. 2d. In respect of the person slain; as the killing of an officer in the due execution of his duty. 3d. In respect of the person killing; as if A. assault B., to rob him, and in resisting, A. killeth B., this is murder by malice implied. 3 Inst. 52. The same doctrine is laid down by Lord Hale. "When one voluntarily kills another *without any provocation*, it is murder; for the law," says he, "presumes it to be malicious, and that he is *hostis humani generis*." 1 Hale P. C. 455. Neither of these eminent judges and learned writers on criminal law takes notice of any presumption of malice from the mere act of homicide.

On the other hand, it is true that Sir Michael Foster, an eminent judge certainly, and a learned writer on criminal law, does lay down, in his discourse on homicide, the doctrine of presumption as now contended for on behalf of the Commonwealth. But the only case cited in support of the doctrine is *The King* v. *Oneby*, which was decided on a special verdict upon the facts and circumstances accompanying the killing, and not on any presumption of malice from the act itself. This opinion of Sir Michael Foster, which has principally

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given currency to the doctrine contended for by the counsel for the Commonwealth, is supported only by a few *dicta* of judges, which, as it seems to me, are founded on no just principle. Blackstone, in his commentaries, says, "all homicide is presumed to be malicious, until the contrary appeareth upon evidence." 4 Bl. Com. 201. But Foster's discourse on homicide is alone cited in support of the presumption. East, in his treatise, cites Foster and Hale; but the latter, as already remarked, does not support the doctrine. 1 East P. C. 224. Russell, in his treatise, lays down the same rule of presumption, but cites only Blackstone in its support. 1 Russell on Crimes, (1st ed.) 615. Roscoe on criminal evidence cites East & Hale, and also 8 Car. & P. 35. But the case in Car. & P. was one of secret homicide, and there was no evidence that the prisoner was the guilty party, except from his own statements. In the same volume, p. 22, (*The King* v. *Morrison*,) a prisoner was indicted and convicted of manslaughter, simply on his admission, on being arrested, that he was the person who killed the deceased. Park, J. in his instructions to the jury, said, "the death of man, if it be shown to have been occasioned by the prisoner, will be murder or manslaughter, as the circumstances may turn out, unless it is shown by the prisoner to have been occasioned by accident." And this is the doctrine contended for by the prisoner's counsel, in the present case. In this case, the facts and circumstances accompanying the homicide were proved, and the jury were bound to decide the question, whether the crime were murder or manslaughter, according to the evidence, without any regard to the presumption relied on in support of the prosecution.

Taking into consideration all these authorities and *dicta*, and the statements of the law of homicide by the writers on criminal law, I am of opinion that the following conclusions are maintained on sound principles of law and manifest justice: 1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act

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of killing. 2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him. And, consequently, that the instructions to the jury, in the present case, on the question of malice, were erroneous. In my opinion, the jury should have been instructed, that the burden of proof was on the government, and that the prisoner could not be legally convicted of the crime charged, unless they were convinced, beyond a reasonable doubt, that he was in fact guilty of that crime; that a preponderance of the evidence, if a reasonable doubt remained, was not sufficient; and that the question of malice was to be decided on the facts and circumstances accompanying the homicide, and not on any presumption from the mere act of killing.

I am therefore constrained to say, with great deference to the opinion of my learned brethren, that, in my judgment, the prisoner is entitled to a new trial.

JOSEPH S. HOPE *vs.* THE COMMONWEALTH.

An indictment for larceny must state the value of the articles alleged to be stolen; and if it alleges the stealing of various articles, but states only the collective value of the whole of them, and the jury find the defendant guilty of stealing only a part of them, no judgment can be legally rendered against him.

WRIT OF ERROR. The plaintiff in error and Timothy Peterson were tried in the court of common pleas, in the county of Middlesex, on an indictment which contained two counts. The first count alleged that said Hope and Peterson, on, &c. at Malden in said county, sundry bank bills, one pair of calf-skin shoes, one hair brush, and two combs, all of the value of sixty two dollars, of the moneys, goods and chattels, of one Samuel

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Shute, then and there in the dwelling-house of said Shute being found, feloniously did steal, take and carry away, in the dwelling-house aforesaid. The second count alleged that said Hope and Peterson, on, &c. at Medford in said county, one set of steelyards, one block tin teapot, and one lot of cut nails, all of the value of three dollars, of the goods and chattels of one Nathan Tufts, then and there in the dwelling-house of said Tufts being found, feloniously did steal, take and carry away, in the dwelling-house aforesaid.

The said Peterson pleaded guilty, generally, and the said Hope (the plaintiff in error) pleaded guilty as to the first count, and not guilty as to the second. The verdict of the jury was that "the said Joseph S. Hope is guilty of stealing the steelyards, as charged in the second count, and not guilty of stealing the other articles charged in the second count." The court thereupon sentenced said Hope to imprisonment in the state prison.

The assignment of error was thus: "Said judgment is illegal and void, in that it exceeds the punishment for simple larceny under one hundred dollars, of which alone, if any thing, in said record, the said plaintiff in error stood convict; the first count in the indictment, on which said judgment is founded, being bad for an uncertain description of the property stolen, and for an aggregate valuation being put upon all the articles therein named; and the second count being bad, because, under the finding of the jury, no value is shown to the articles of the stealing of which he is convicted."

G. Bemis, for the plaintiff in error. Both counts in the indictment are bad, because only the collective value of the different articles, which are alleged to have been stolen, is stated. The value of each article should have been expressed. See *The King* v. *Forsyth*, Russ. & Ry. 274. *Payne* v. *The People*, 6 Johns. 103. *Commonwealth* v. *Smith*, 1 Mass. 245. *The State* v. *Somerville*, 8 Shepley, 20. *Highland* v. *The People*, 1 Scam. 392. 2 Stark. Crim. Pl. (2d ed.) 450, *note*, (*c.*) The first count is also bad as to the bank bills therein mentioned, for want of any kind of description of them. *Stew-*

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art v. *Commonwealth*, 4 S. & R. 194. *The King* v. *Fry*, Russ. & Ry. 482.

On the second count, the plaintiff in error was found guilty of stealing a set of steelyards, and nothing else. *Non constat* that they were of any value, or, if of any, of what value. So, if the bank bills be stricken from the first count, *non constat* that the other articles therein mentioned were of any value. See *O'Connell* v. *Commonwealth*, 7 Met. 460.

S. D. Parker, for the Commonwealth.

Dewey, J. The plaintiff in error was charged with stealing various articles particularly set forth, to which was added a collective value only; and upon the trial, the jury acquitted him of the larceny charged in the second count, except as to one article. The question is, whether the larceny of that article is well charged.

Assuming that a collective value may be unobjectionable, where the party is found guilty of stealing the entire property described and charged to be stolen, yet it is insisted, that if allowable to that extent, it can go no further, and that, where many articles are described as of a collective value, the entire value might be attached to those articles as to which the jury have acquitted the party, and thus the remainder be really without value, and not the subject of larceny. This course of reasoning seems well founded, and leads to the result, that we have the finding of the jury that the defendant is guilty of feloniously stealing a set of steelyards, but not finding that they were of any value; and unless the allegation of value of the article alleged to be stolen is an entirely immaterial one, the defendant cannot be sentenced under this finding, upon an indictment charging merely a collective value of all the articles alleged to have been stolen.

The well settled practice, familiar to us all, has been that of stating in the indictment the value of the article alleged to have been stolen. Such is the rule as stated in 2 Hale P. C. 182; 3 Chit. Crim. Law, (4th Amer. ed.) 947 *a*; 1 ib. 238; and *Commonwealth* v. *Smith*, 1 Mass. 245. The reason for requiring this allegation and finding of value may have been, ori-

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ginally, that a distinction might appear between the offences of grand and petit larceny, in reference to the extent of punishment; that being graduated, in some measure, by the value of the article stolen. Our statutes, it will be remembered, prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment, and that, where an indictment alleges a larceny in various articles, and adds only the collective value of the whole, such allegation is not sufficient, where the defendant is not found guilty of the larceny as to the whole.

Judgment reversed.

COMMONWEALTH *vs.* CHRISTOPHER H. BRYDEN.

An indictment on the Rev. Sts. c. 47, alleged that B. on the 30th of April 1844, *and on divers other days and times between the 1st of January and the 1st Monday of May 1844, did presume to be and was a retailer and seller of spiritous liquor, in a less quantity than twenty eight gallons,* &c. without being duly first licensed as a retailer of wine and spirits, as is provided by law, and did then and there sell and retail spiritous liquor to J. C. in a quantity less than twenty eight gallons, &c. to wit, in the quantity of half a pint. *Held*, that the words in italics might be rejected as surplusage, and that the remaining words sufficiently alleged a single act of selling spiritous liquor, by the defendant, without license.

THIS was an indictment, returned to the municipal court on the first Monday of May 1844, in which it was alleged that the defendant, "on the thirtieth day of April, in the year of our Lord eighteen hundred and forty four, at said Boston, and there on divers other days and times, between the 1st day of January last and the 1st Monday of May, did presume to be and was a retailer and seller of wine, rum, brandy and other spiritous liquor, in a less quantity than twenty eight gallons, and that delivered and carried away all at one time; he the said Bryden then and there not being duly first licensed as a retailer of wine and spirits, as is provided by law and in

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the forty seventh chapter of the revised statutes of said Commonwealth; and he did then and there sell and retail spiritous liquor to a person whose name is Jacob Clapp, in a certain quantity less than twenty eight gallons, and that delivered and carried away at one time, to wit, in the quantity of half a pint, against the peace of said Commonwealth, and the form of the statute in such case made and provided."

The defendant, after *nolo contendere* entered, moved in arrest of judgment, because the indictment did not charge the time when he sold spiritous liquor in a less quantity than twenty eight gallons, &c. with the certainty and precision required by law, so as to enable the court to render judgment of guilty, or so as to apprise him of the precise offence of which he stood charged, and enable him to prepare for his defence. This motion was overruled by the municipal court, and the defendant thereupon alleged exceptions.

Wheelock, for the defendant.

S. D. Parker, for the Commonwealth.

Dewey, J. Enough is set forth in the indictment to constitute the offence of a single act of selling spiritous liquor without being duly licensed, if we strike out all that part which charges generally that the defendant, "on divers days and times between the 1st day of January and the 1st Monday of May, was a retailer and seller of wine, rum, brandy and other spiritous liquor." This, we think, may be stricken out, upon the authority of *Commonwealth* v. *Pray*, 13 Pick. 359, and *The People* v. *Adams*, 17 Wend. 475.

Exceptions overruled.

Commonwealth *vs.* James Simpson.

An indictment which alleges that the defendant did "embezzle, steal, take and carry away," certain goods, is not bad for duplicity, as charging the two offences of embezzlement and larceny: The word "embezzle" will be rejected as surplusage, and the indictment be regarded as charging a larceny only.

Evidence of embezzlement will not support an indictment for mere larceny, although the Rev. Sts. c. 126, declare that a party who embezzles money or goods shall be deemed, by so doing, to have committed the crime of larceny.

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In order to warrant the admission of evidence that an indicted party has embezzled money or goods, the indictment must allege matter sufficient to apprise him that he is charged with embezzlement.

The indictment in this case alleged that the defendant and Thomas Chubb, John Chubb and Moses Mason, "on the 30th of July 1842, at Boston, with force and arms, ten boxes of boots, of the value of $200, of the goods, chattels and property of one Elmer Townsend, in a certain vessel called the schooner Saul, then lying and being in the harbor of Boston, within the body of the county of Suffolk, said boxes being in his, said Townsend's, possession then and there in the vessel aforesaid, and ten boxes of candles, of the value of $50, of the goods and chattels of one John Mixer and one Winslow Whittemore, in their possession then and there being also in the vessel aforesaid, at said Boston, within the body of said county of Suffolk, and twenty five bags of coffee, of the value of $700, of the goods and chattels of certain persons doing business under the name and firm of Hand & Williams, as copartners in trade, whose names are not known to said jury, in their possession also in the same schooner Saul, in said Boston, within said county of Suffolk, then and there being, did then and there embezzle, and in said vessel, in the day time, feloniously steal, take and carry away," &c.

At the trial in the municipal court, the jury found the defendant guilty of stealing the coffee alleged to be the property of Hand & Williams, and not guilty as to the rest of the indictment. Upon the return of the verdict, the defendant filed the following exceptions, which were allowed by the court: "1st. The defendant, at the trial, moved that the indictment be quashed on account of defect both in form and substance; in that it was double in charging both larceny and embezzlement, while the possession of the goods, alleged to have been feloniously taken, was laid in parties other than the defendant. The court ruled that there was no duplicity in the indictment, and that it was a good indictment for simple larceny. To this decision the defendant excepted. 2d. The indictment being thus held to be an indictment for larceny

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simply, evidence was introduced tending to show that the defendant was in possession of the goods, which were alleged to have been taken feloniously, as a carrier for hire, and therefore, as he contended, if any felonious conversion of said goods took place, it was in the nature of an embezzlement or breach of trust. The defendant set up that this was a variance between the indictment and the proof; that larceny was charged, and that the proof tended to establish embezzlement, which was a distinct crime, although made, by the Rev. Sts. *c.* 126, § 30, subject to the pains and penalties of larceny. The court ruled that the statutes had so made embezzlement larceny, that it was competent and sufficient to prove embezzlement under an indictment for larceny, which did not set forth the fiduciary relation of the defendant to the property; and that, therefore, there was no variance between the indictment and proof in this case."

W. Hilliard & N. Hale, Jr. for the defendant. The indictment was bad for duplicity, as it charged embezzlement and larceny in one count. If the two offences can be joined in the same indictment, there must be several counts. 1 Chit. Crim. Law, (4th Amer. ed.) 248, 253, 254. 2 Stark. Crim. Pl. (2d ed.) 453.

If the indictment is held to be for larceny only, proof of embezzlement does not support it. The two offences are distinct, although the punishment of both is the same. Besides; embezzlement by carriers, &c. is to be deemed simple larceny. Rev. Sts. *c.* 126, § 30. But this indictment sets out an aggravated larceny, and the verdict finds that an aggravated larceny was committed by the defendant. Clearly, the proof of embezzlement by a carrier does not sustain such an indictment, even if it would sustain an indictment for simple larceny.

The defendant was entitled, by the declaration of rights, to have his offence fully and plainly, substantially and formally, described to him, before he could be legally held to answer for it. Such a description of the offence of which he has been found guilty was not presented to him.

S. D. Parker, for the Commonwealth. The indictment is

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for larceny merely; differing from the usual form only by the addition of the word "embezzle" to the words "take, steal and carry away." It cannot be considered as an indictment for embezzlement, because none of the fiduciary relations are therein stated, which are mentioned in the Rev. Sts. *c.* 126, §§ 27–30. But embezzlement is larceny, and proof of it supports a charge of larceny. See *The People* v. *Hennessey*, and *The People* v. *Dalton*, 15 Wend. 147, 581. *The People* v. *Sherman*, 10 Wend. 298. *Regina* v. *Hunt*, and *Regina* v. *White*, 8 Car. & P. 642, 742.

Dewey, J. This indictment is not bad for duplicity, as charging the two offences of larceny and embezzlement in the same count. The term "embezzle" is introduced into the count, but not in any such manner as to give to the count the character of a charge of embezzlement. It is without any of those technical allegations essential to a charge of embezzlement; and the indictment being perfect without it, as a charge of larceny, the word "embezzle" may well be stricken out as surplusage.

The further inquiry then is, whether upon this indictment, thus expurgated of every thing indicative of a charge of embezzlement at common law, the defendant may be convicted upon proof that he embezzled the articles charged to have been feloniously stolen. If he can be thus found guilty, and properly be punished under this indictment, it must be under the authority of the Rev. Sts. *c.* 126, § 30, enacting that persons guilty of the embezzlement therein described "shall be deemed, by so doing, to have committed the crime of simple larceny."

It is quite obvious that, whatever the effect of this statute may be in cases of indictments for simple larceny, it cannot avail the government in the present instance, as the statute only declares that certain acts of embezzlement shall be deemed to be simple larceny. But this indictment charges an aggravated larceny — a larceny in a vessel; and the conviction will be, if judgment be rendered upon the verdict, a conviction of such aggravated larceny. For this reason, therefore, independently

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of the more general objection, evidence of mere embezzlement, by the defendant, was not sufficient to authorize the jury to find the defendant guilty of the offence charged in this indictment.

We have, however, at the request of counsel, and with reference to further proceedings in this case, considered the general question, whether an indictment for simple larceny is an appropriate and legal form for charging a case of embezzlement under the Rev. Sts. *c.* 126, § 30. The statute in terms says, that the person doing certain acts "shall be deemed, by so doing, to have committed the crime of simple larceny." Treating this statute as one defining the offence of larceny, and, under the legislative authority, embracing within it a larger range of offences, to be hereafter known and recognized as larcenies, it would well authorize all offences described in it to be charged as larcenies, relying upon the statute as an authority for the position, that the cases may be punished as larcenies. But we do not feel authorized to give so broad a construction to this statute, and one which would entirely merge the crime of embezzlement in that of larceny. The general object of the various statutes in relation to embezzlement, in England and in this Commonwealth, doubtless was, to embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection, arising from the fact of a possession lawfully acquired by the party, screened him from punishment. They were therefore declared crimes punishable by law.

The purposes of this statute may, as it seems to us, be sufficiently attained, without any infringement of those rules of criminal pleading which require the charge to be particularly and certainly set forth. The defendant should, as far as is reasonably practicable, be apprised, by the indictment, of the precise nature of the charge made against him. This, in embezzlement, so far as respects the nature of the offence or character of the crime charged, may be easily indicated by setting forth the fiduciary relation, or the capacity in which the

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defendant acted, and by means of which the property came into his possession, and by charging the fraudulent conversion. Such seems to have been the practice under the English *Sts.* 21 Hen. 8, *c.* 7, 39 Geo. 3, *c.* 85, and 52 Geo. 3, *c.* 63. See the forms of indictment, in 3 Chit. Crim. Law, (4th Amer. ed.) 961, *& seq.* Archb. Crim. Pl. (1st ed.) 156.

The court are of opinion that the two offences of larceny and embezzlement are so far distinct in their character, that under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and that, in cases of embezzlement, the proper mode is, notwithstanding the statute to which we have referred, to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. Although the party, in the language of the statute, "shall be deemed to have committed the crime of simple larceny," yet it is a larceny of a peculiar character, and must be set forth in its distinctive character.

New trial ordered.

AMOS A. TILLINGHAST, Executor *vs.* THADDEUS COOK & others.

A testator, after giving all his property to his wife during her life, made the following bequest: "Eleventh. I give and bequeath unto the legal heirs of my late sister Abigail the sum of $1000:" In the seventh article of his will, he bequeathed $1800 to the legal heirs of his late sister Grace: In the twenty first article, he bequeathed to S. & J., sons of his late sister Grace, his wearing apparel, "in addition to their proportion of the devise and bequest made to the legal heirs of Grace in the seventh article:" In the last article, he gave all the residue of his property "to the legal heirs" of his brothers and sisters, to whom he had, in previous articles, made devises and bequests, "to be divided between them in the same relative proportions in which" he had "already devised and bequeathed to them:" And he directed that the said several legacies and sums of money, given and bequeathed in his will, should be paid to the respective legatees, in two years after the death of his wife: At the time of the testator's death, three children of his deceased sister A. were alive, viz. T., Abigail and V.: Abigail died during the life of the testator's widow, leaving a will in which she bequeathed all her claims to the legacies given to the legal heirs of her mother. *Held*, that on the death of the testator, the legacies to the legal heirs of A. vested in A.'s said three children, severally and not jointly; and that T., Abigail's executor and V. were each entitled to one third of the amount of those legacies.

THE plaintiff alleged, in a bill in equity, that he was executor of the last will of Eliphalet Slack, late of Seekonk.

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which was duly proved and allowed on the 1st of August 1826: That said Eliphalet, by said will, after giving the use of all his property to Sarah, his wife, during her life, made the following bequest: "I give and bequeath unto the legal heirs of my late sister Abigail, the wife of Daniel Cook, deceased, the sum of one thousand dollars:" That the residuary clause in said will was thus: "*Lastly.* I give, devise and bequeath all the residue and remainder of my estate or estates, both real and personal, after all just demands on the same, and charges of administration, shall have been paid, to the legal heirs of my late brother John Slack; the legal heirs of my late brother Samuel Slack; the legal heirs of my late sister Jerusha; the legal heirs of my late sister Grace; the legal heirs of my late sister Esther; the legal heirs of my late sister Mary; the three heirs of my sister Hannah, as mentioned in the tenth article; *the legal heirs of my sister Abigail;* Levina Brown and Sukey Anthony, daughters of my late brother Benjamin Slack; and Charles Clark, the son of my late sister Margaret; to be divided between them in the same relative proportions in which I have already devised and bequeathed to them:" That said Eliphalet, by said will, in the fourth and nine following articles thereof, made devises and bequests to the devisees and legatees mentioned in said residuary clause: That in the tenth article of said will, mentioned in said residuary clause, the bequest was as follows: "I give and bequeath to the following heirs of my late sister Hannah, that is to say, Molly Simmons, Gilbert Simmons and Charles Simmons, the sum of four hundred dollars each:" That by said will, all the legacies and sums of money, therein given and bequeathed, were to be paid to the respective legatees, by his executor, (the plaintiff,) at the expiration of two years from the decease of the testator's wife, upon their demanding the same.

The bill also alleged, that the said Sarah, wife of said testator, survived him, and died on the 14th of March 1841: That said Abigail Cook, sister of said testator, left three children surviving her, viz. Thaddeus Cook, Abigail Cook, 2d, and Vicey Darling, widow of John Darling: That Abigail Cook, 2d

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died after the said testator, and before the death of the said Sarah, his widow, and left three children surviving her, viz. Alden Ballou, Willard Ballou, and Rene Jillson, wife of Clark Jillson; and that said Rene died since the death of said testator, and before the death of said Sarah, his widow, leaving her said husband, and four children, who are all now minors, viz. Origin Jillson, Otis Jillson, Stephen Jillson, and Abby A. Jillson: That said Abigail Cook, 2d made a will, and thereby appointed the said Willard Darling her executor, and gave all her interest and claim in and to any legacies under the will of said testator to said Alden and Willard, to the exclusion of the said Rene and her children.

The bill further alleged, that the said children of the said Rene claim a portion of the legacies given by the will aforesaid to the legal heirs of the testator's sister Abigail, on the ground that the said Abigail Cook 2d, daughter of his said sister Abigail, had no interest, under said will, which she could bequeath: And that the legatees, under the will of said Abigail Cook 2d, claim the whole of one third of the legacies left to the legal heirs of the testator's sister Abigail, to the exclusion of the children of the said Rene Jillson.

The plaintiff annexed to his bill a copy of said will, which he prayed might be taken as part thereof; and he concluded by praying that the court would order, decree and adjudge, to whom, and in what proportions, and on what conditions, the plaintiff should pay the legacies left to the heirs of Abigail Cook, the testator's sister; and that a writ of subpœna should be directed to the abovenamed Thaddeus Cook, Vicey Darling, Willard Ballou, (in his individual capacity, and as executor of the last will of Abigail Cook, 2d,) Alden Ballou, and Clark Jillson and his minor children.

The court granted a writ of subpœna, and appointed a guardian *ad litem* for said minor children. The said guardian and Thaddeus Cook made answers to the bill, not denying the facts therein stated, and submitting their respective rights to the protection of the court.

Written arguments were presented to the court, in June

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1844, in behalf of Willard Ballou, executor of the will of Abigail Cook, niece of the testator, and also in behalf of Thaddeus Cook.

In behalf of said Ballou, it was submitted, that upon the death of the testator, the legacies given to the heirs of Abigail Cook vested in said Thaddeus, Abigail 2d, and Vicey, severally and not jointly; each being entitled to one third thereof, in two years after the death of the testator's widow; that said Abigail 2d therefore made a valid disposition of her interest in said legacies, viz. one third thereof, by her last will; and that said Ballou, as her executor, was entitled to demand and receive the same of the plaintiff.

In behalf of Thaddeus Cook, it was submitted, that said legacies, on the death of the testator, vested in said Thaddeus, Abigail 2d, and Vicey, jointly and not severally; and that, as said Abigail 2d died before they were payable, the said Thaddeus and Vicey took the whole of them by survivorship.

No argument was presented in behalf of the plaintiff, or the minor children of Rene Jillson.

Fletcher & Sewall, for Willard Ballou.

T. P. Chandler, for Thaddeus Cook.

Wilde, J. This is a bill in equity, in the nature of a bill of interpleader, brought by the executor of the last will of Eliphalet Slack, praying for directions to whom and in what proportion he shall pay the legacies given by said will to the legal heirs of Abigail Cook, the testator's sister. The only question is, whether these legacies, on the decease of the testator, vested in the heirs, as joint tenants or as tenants in common; for it is very clear, and indeed it is admitted by the counsel for the surviving heirs of the said Abigail Cook, that the said legacies did so vest in them and in Abigail Cook, the daughter of said Abigail, who, however, has since deceased, and before the said legacies were payable; and they claim the whole interest as survivors.

By the rule of the common law, as settled in many cases, when a legacy is given to two or more persons, and there are no words of severance of the interests, the legatees will take as joint tenants, unless from the whole will a contrary inten-

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tion is indicated; for in all cases, the intention of the testator is to govern in the construction of a will, if it can be ascertained with reasonable certainty, and is not inconsistent with the rules of law. The question, therefore, is reduced to this; whether it satisfactorily appears, from the whole will, that it was the intention of the testator to give these legacies to the heirs of his sister Abigail Cook, to take the same as tenants in common, and not as joint tenants.

It is contended by the counsel for the executor of the last will of Abigail Cook, the testator's niece, that this intention does appear with sufficient certainty. The first and principal ground on which they rely is, that the devises and legacies to all the heirs of the testator's deceased brothers and sisters indicate an intention that they should take *quasi* heirs of their deceased parents respectively, and in the same manner as if the legacies had been given to their parents when living, and came to them, as heirs, by the statute of descents and distributions. And this seems to be maintained by the rule of construction, as laid down in 2 Jarman on Wills, 47, 48. The rule as there laid down is, that where legacies are given to the relations of a party, not only the persons to take are ascertained by the statute of distributions, but the proportions they are to take. It is objected, that this rule of construction does not apply in the present case, because the words "legal heirs" were used merely to designate the persons to take, and other legacies are given to legatees in express terms, naming them, and to these the legacies were given to take as tenants in common, or rather the portion of each was designated; showing that the testator was acquainted with the legal import of terms necessary to express his intention.

This objection does not strike us with much force; because where legacies were given to the particular heirs of a deceased brother or sister, not including all the heirs, the legatees could not take according to the statute of distributions; and in all such cases, several legacies were given; which indicates a preference, in the mind of the testator, in favor of several rather than of joint legacies; and this is in conformity with the policy

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of the law; the estates of tenants in common being more advantageous than those of joint tenants, because it seems more just that in case of the death of one of the legatees, his share should go to his children, rather than to the surviving legatees.

It is further objected, that the rule laid down in Jarman applies only to the question, whether the parties claiming a legacy shall take *per stirpes* or *per capita*. But that question might have arisen under the present will. If any one of the three children of Abigail Cook had died during the life of the testator, leaving children, those children would have taken *per stirpes*; for the legacy, in such case, would not have lapsed. *St.* 1783, *c.* 24, § 8, and Rev. Sts. *c.* 62, § 24. The legacy did not vest until the death of the testator, and then it vested in those who were heirs of Abigail Cook at that time. But, independently of this question, we think that when a legacy is given to the legal heirs or next of kin of a person, without mentioning the proportion in which the fund is to be divided, it is a reasonable inference that the legatees should take *quasi* heirs or next of kin, according to the statute of distributions. *Daggett* v. *Slack*, 8 Met. 450

Another ground relied upon by the executor of Abigail Cook, the testator's niece, relates to the seventh and twenty first articles in the will. In the seventh article, the testator, after devising two houses "to the legal heirs" of his late sister Grace, the wife of Abner Haskell, makes them a bequest in these words: "I also give and bequeath to the said legal heirs of my sister Grace, as aforesaid, the sum of eighteen hundred dollars in cash," &c. The twenty first article of the will was thus: "I give and bequeath to Samuel Haskell and John Haskell, sons of my late sister Grace, all my wearing apparel, in addition to their proportion of the devise and bequest made to the legal heirs of Grace Haskell, in the seventh article." It is contended that the word "proportion" indicates the intention of the testator that these legatees should take in definite proportions, and not as joint tenants. And it seems to us that this inference is not unreasonable; and if so,

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the same construction is to be given to the bequest to the heirs of Abigail Cook.

It is a well established rule of construction, as laid down in Wigram on the Interpretation of Wills, 15, that "a testator is always presumed to use the words, in which he expresses himself, according to their strict acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed." 2 Eden, 196, *note*. *Royle* v. *Hamilton*, 4 Ves. 437.

The counsel for the executor of Abigail Cook, the testator's niece, rely also on the residuary clause in the will, by which the residue is given to all the devisees and legatees to whom his other property was given, "to be divided between them in the same relative proportion" in which the testator had "already devised and bequeathed to them." It is argued that the residue, by this clause, is to be divided among all the devisees and legatees in definite proportions; and as the residue is not given jointly, the prior legacies, which regulate the division of the residue, are not to be considered as joint. And we think such a construction, taken in connexion with the other clauses in the will, may reasonably be considered as the true construction of this residuary clause.

Upon the whole, therefore, we are of opinion that the heirs of Abigail Cook were entitled to their shares of the legacies to them, as tenants in common, and consequently that the executor of Abigail Cook, the testator's niece, is entitled to a third part of these legacies.

The counsel for the surviving legatees has relied on the decision in *Emerson* v. *Cutler*, 14 Pick. 108, as inconsistent with the construction now given to this will. But there is nothing inconsistent with the rules of construction now adopted, in the rules of law laid down in that case. It has been often said, and truly said, that the construction of one will is no authority for the construction of another, unless both are in all their material provisions similar. In *Emerson*

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v. *Cutler*, the testator gave the use and improvement of one third part of his estate to his widow during her life, and at her decease he gave the same to his children. And it was held, that the children took the personal estate as joint tenants. But there was nothing in any part of the will tending to show that the testator used the words of the bequest in any other sense than according to their strict legal acceptation. The decision in that case, therefore, is not inconsistent with the principles and the rules of construction upon which we decide the present case.

The court being of opinion that the legacies to the legal heirs of Abigail Cook vested, at the testator's decease, in her three children, Thaddeus, Abigail 2d and Vicey, severally and not jointly; and the said Abigail 2d having died after the death of the testator, and before the death of his widow, and left a will bequeathing her interest in said legacies, and appointing Willard Ballou her executor; the decree will be, that the plaintiff pay to Thaddeus Cook, Vicey Darling, and Willard Ballou, executor as aforesaid, each one third of the said sum of $1000 given to the legal heirs of Abigail Cook, and also pay to them, respectively, each one third of the residue and remainder of the estate of said Eliphalet Slack, as is given to the legal heirs of Abigail Cook, under the residuary clause of said Eliphalet's will; and that the costs and expenses of this suit be paid by the plaintiff out of the estate of said Eliphalet in his hands.

WALTER CORNELL *vs.* BENJAMIN C. JACKSON.

When A. conveys land to B., "bounded on land of T.," the true line of T.'s land is the boundary of the land conveyed, although A. and T. had previously agreed, by parol, on a different line, and had set up stakes to mark such line, and had afterwards held possession of their respective lands according to such line; and if B. be evicted from the land lying between the true and the agreed line, he has no remedy on A.'s covenant of warranty, unless A., at the time of the conveyance, pointed out the agreed line as the true one.

THIS was an action of covenant broken, commenced on the 9th of July 1844. The plaintiff alleged in his declaration,

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that the defendant, on the 29th of May 1827, by his deed of that date, "conveyed to the plaintiff one undivided third part, and all his right, title and interest, being one half of the reversion, after the decease of the defendant's mother, of a certain parcel of land in Boston, described in said deed as follows; viz. beginning at the north side of Orange Place, at the distance of 560 feet from Washington Street, and running westerly to the line of division between the city of Boston and the Mill Dam Corporation, being bounded south by land of Edward Tuckerman; on the east by land of Joseph Pope, there measuring sixty seven feet and ten inches; and on the north by land of Joseph P. Tolman." The plaintiff also alleged, in his declaration, that the defendant, in his said deed, covenanted with the plaintiff, (among other things,) "as to that portion of the granted premises which lie immediately next to the land of Joseph Pope, and extending 323 feet therefrom, that he was lawfully seized thereof in fee simple," &c. "and that he would warrant and defend such portion of the granted premises, as is last above described, to the plaintiff, his heirs and assigns forever, against the lawful claims and demands of all persons." The plaintiff further alleged, in his declaration, that the defendant's mother deceased, after the making of said deed, to wit, in the year 1839, and that the plaintiff immediately thereupon entered into possession of said granted premises; but that he had since been evicted by the Boston and Worcester Rail Road Corporation, of a parcel of said premises, (describing it,) which the defendant covenanted, as aforesaid, to warrant and defend against the lawful claims and demands of all persons; and that the defendant had not kept his said covenant of warranty, but had broken the same.

At the trial before *Shaw*, C. J. the plaintiff gave evidence of the execution of the deed declared on, and of the death of the defendant's mother in 1839. In order to prove the eviction, as alleged in the plaintiff's declaration, he gave evidence that, about five years before the date of said deed and covenants, the ancestor of the defendant, Johnson Jackson, whose estate was bounded southerly on Edward Tucker-

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man, and northerly on Joseph P. Tolman, entered into a parol agreement with those parties, respectively, to ascertain and mark the dividing line, running westerly between their respective lands, towards and on to the flats; that by mutual agreement they ran those lines, and drove down stakes at convenient distances; that neither of said parties, up to the time of the defendant's deed aforesaid to the plaintiff, had claimed any title or possession beyond those lines; and that such was the state of the land when the aforesaid deed and covenants were made: That by subsequent proceedings in a suit between Mary Tolman and George Sparhawk and others, (5 Met. 469,) the actual line of said Joseph P. Tolman's lot, as ascertained by the deeds and legal title, was decided to be considerably south of the conventional line, so as aforesaid agreed on by parol; and that the plaintiff had been since evicted from that parcel of land which lies between the conventional and the actual southerly line of the Tolman lot.

The judge ruled, "that the terms used in the defendant's deed, viz. 'on the north by Joseph P. Tolman,' must be construed to mean the land of which said Tolman had title, and not the conventional line agreed on by parol; although it was supposed, at the time, that the conventional line was the true line of Tolman's title, and although the actual southerly line of the Tolman land was established long afterwards."

A verdict was then taken for the defendant, by consent, subject to the opinion of the whole court.

C. P. Curtis & G. G. Hubbard, for the plaintiff. As the parties were in possession of the land according to the conventional lines, the defendant had a right to convey his possessory title, even though he obtained it by disseizin; and he is bound by his covenant of warranty. *Slater* v. *Rawson*, 6 Met. 439. It was his intention to convey the land within those lines, and that intention is to be regarded. *Waterman* v. *Johnson*, 13 Pick. 261. *Frost* v. *Spaulding*, 19 Pick. 445. *Moore* v. *Magrath*, Cowp. 9. *Bridge* v. *Wellington*, 1 Mass. 227. *Adams* v. *Frothingham*, 3 Mass. 360 – 362. *Marvin* v. *Stone*,

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2 Cow. 781. The construction of his deed is not to be affected by facts that occurred subsequently to its execution. *Van Wyck* v. *Wright*, 18 Wend. 157.

If the description of the boundaries in the deed be doubtful on its face, the construction given to it by the parties, and the manner in which the conveyed premises were used by the grantee, are of great weight. *Stone* v. *Clark*, 1 Met. 378. *Weld* v. *Hornby*, 7 East, 199. *Codman* v. *Winslow*, 10 Mass. 149. *Attorney General* v. *Drummond*, 1 Drury & Warren, 353. *Melvin* v. *Proprietors of Locks and Canals*, 5 Met. 15. In the case at bar, all the parties to the conventional lines occupied only the land within those lines, until after the defendant made his deed to the plaintiff.

The case of *Crosby* v. *Parker*, 4 Mass. 110, will be relied on by the defendant. But the grantee, in that case, *did not know that the grantor claimed* the land, for the purchase of which he had previously made a parol contract. The *intention* of the parties was regarded in the decision of that case.

Sparhawk, for the defendant, relied on *Crosby* v. *Parker*, 4 Mass. 110.

Wilde, J. This is an action of covenant for the alleged breach of the covenant of warranty in a deed from the defendant to the plaintiff, conveying an undivided third part of a piece of flats from which the plaintiff has been evicted. The case depends on the construction to be given to the description in the deed of the land conveyed. It is bounded on the south by land of Edward Tuckerman, and on the north by land of Joseph P. Tolman; and the question is, whether the land conveyed was bounded by the actual lines of those two lots of land, or by the conventional lines agreed upon by the parties, as stated in the report of the case. And this question we consider settled by the decision in the case of *Crosby* v. *Parker*, 4 Mass. 110. In that case, the land conveyed was described as bounded on the land of B., who, at the time of the conveyance, owned a piece of land, and had contracted to purchase another piece adjoining, which he occupied as his own, but had received no conveyance of it, although he had paid the

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price for it; and it was held that the land conveyed was bounded by the land owned by B., and not by that occupied by him. That case, on the point in question, cannot be distinguished from the present case; and the decision appears to us to be well founded. The conventional lines were not binding on the parties; and although the defendant had, at the time of the conveyance, a constructive possession of his lot, according to those lines, yet he was not the owner beyond the true lines of the adjoining lots.

It has been argued, that it must be presumed that the grantor intended to convey the premises in conformity with the conventional lines, because he supposed, at the time of the conveyance, that those were the true lines; and this may well be. But he also must be presumed not to have intended to convey any part of the adjoining lots, to which he had no valid title. The question therefore is not, what land was supposed to be conveyed, but what land was actually conveyed; and this must be determined by the description in the deed. Now, no reference is there made to these conventional lines; nor does it appear that the plaintiff, at the time of his purchase, had any knowledge of the agreement between the defendant and the proprietors of the adjoining lots. If he had any such knowledge, he should have required a reference to those lines in the description of the land purchased; or, at least, he should be able to prove that the monuments on these lines were pointed out, as indicating the limits of the land purchased, at the time of the sale. Such evidence would be admissible, according to the decision in the case of *Frost* v. *Spaulding*, 19 Pick. 445. But, in the absence of any such proof, we think it clear that when a lot of land is conveyed, describing it as bounded by an adjoining lot, the true dividing line between those lots must be considered as referred to as a boundary of the land conveyed. This being the construction of the deed in question, judgment is to be entered on the verdict for the defendant.

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Solomon Piper *vs.* Thomas Richardson.

A., for his own use and benefit, brought a writ of entry against B., in the name of C., and recovered judgment for possession of the premises demanded: B. afterwards brought a writ of entry against A., to recover possession of premises adjoining those which had been thus recovered from him, claiming part of them under the same title by which he attempted to defend against the former suit, and part of them under a different title. *Held*, that the judgment recovered by A., in the former suit, was not conclusive evidence in his favor, in the latter suit, although the proof was the same in both suits.

An alien may acquire an indefeasible title to land, by a possession sufficiently long, by the Rev. Sts. c. 119, § 12, to bar a suit by the Commonwealth to recover the land.

The decision in *Valentine* v. *Piper*, 22 Pick. 85, recognized and confirmed; viz. that the lines dividing the flats appurtenant to the upland lots lying southerly of Summer Street, in Boston, are to run parallel with the lines of that street.

Writ of entry to recover a parcel of flats in Boston, situated below Sea Street and south of Summer Street.

In a former action, brought against the demandant by the tenant, in the name of Andrew C. Valentine and others, for the use and benefit of the tenant, judgment was recovered against the present demandant for a parcel of flats adjoining those which were demanded in the present action. The demandant now claimed part of the flats described in his count, under the same title by which he attempted to defend against said former action, and a larger part thereof he claimed under a different title; it being one of his purposes, in bringing this action, to obtain a revision by the court of the decision in the former action.

At the trial before *Wilde*, J. most of the evidence, on both sides, was the same, in substance, which was introduced on the trial of the former action. So much of this evidence as is necessary to an understanding of the legal questions, which were decided in the case, is stated in the opinion of the court. (See also the report of the case of *Valentine* v. *Piper*, 22 Pick. 85.)

After all the evidence was presented, the case was taken from the jury, to be submitted to the whole court, who, by agreement of the parties, were authorized to draw any inferences of fact which are warranted by the evidence, and to

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enter judgment for the demandant or for the tenant, or to send the case to a jury, as the law might require.

The argument was had at a former term.

Bartlett & B. R. Curtis, for the demandant.

Dexter & C. G. Loring, for the tenant.

WILDE, J.* The facts proved in this case and in the case of *Valentine* v. *Piper*, 22 Pick. 85, are substantially the same, although several questions of law have been now discussed which were not moved or considered in the former action. That action was brought by the present tenant in the names of Valentine and others, and was prosecuted for his own use and benefit; he having purchased the premises from them. So that the parties in interest, in both actions, are the same. The tenant's counsel therefore have argued, that the judgment in the former action is conclusive evidence in his favor, in this case. But we think it very clear that there is no ground on which this argument can be maintained. To render this evidence conclusive, it must appear that both actions relate to the same property; whereas, the contrary appears from a reference to the two writs, in which the several parcels of flats are demanded. This objection to the evidence is decisive. The property now in controversy was not the subject matter of the former suit; and the fact, that the tenant holds both parcels of flats by the same title, is no sufficient answer to the objection. For the demandant now claims the greater part of the flats, which he demands, by a title which does not extend to the premises recovered in the former action. And besides, the demandant has now taken an objection to the tenant's title which was not raised or considered in the former suit. This objection is, that Elizabeth Price, under whom the tenant claims title, and her children at the time of her decease, were aliens, and that thereupon her estates in this country escheated to the Commonwealth. Whether this objection be well founded or not, the demandant is entitled to have it considered by the court, and is not to be estopped by the former

* *Hubbard*, J. did not sit in this case

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judgment. We have therefore considered this case on the facts reported, and the inferences to be drawn therefrom, without reference to the decision in the former action.

As to the objection, that Elizabeth Price and her children were aliens at the time of her decease, there are conflicting decisions, upon which, however, we do not think it necessary to express an opinion, for the reasons which will hereafter be stated. Nor do we think it necessary to decide another question, which has been discussed by counsel. It was contended, by the tenant's counsel, that if Elizabeth Price and her children were aliens, their titles to lands in this country were nevertheless protected, and rendered valid, by the sixth article of the treaty of peace, and confirmed also by the ninth article of the treaty of 1794. And the construction of the articles of these treaties, contended for by the counsel for the tenant, is maintained by the decision of the supreme court of the United States, in the case of *Orr* v. *Hodgson*, 4 Wheat. 453. But, as before remarked, we do not consider it necessary to give any decided opinion on this point; for we think that, without the aid of these treaties, the tenant has proved a valid title by possession, commencing previously to the possession proved by the demandant. And it is very clear that an alien may take real estate by purchase, though not by descent. So he may acquire a title by possession, which, if continued long enough, without the interposition of the State, may establish an indefeasible title.

Now it appears by the evidence, that soon after the treaty of peace, viz. in 1784, William Price and Elizabeth Price took possession of the Price lot, including the demanded premises, and continued their possession undisturbed, taking the rents and profits, until 1820, when they sold it to Lawson Valentine, whose heirs, after his decease, sold the same to the tenant. The right of the Commonwealth to seize this lot of land, as having escheated, if any such right ever existed, has never been enforced or claimed; and it is now barred by the Rev. Sts. *c.* 119, § 12, which provide that "no suit, for the recovery of any lands, shall be commenced by or in behalf of

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the Commonwealth, unless within twenty years after the right or title of the Commonwealth thereto first accrued." The right of the Commonwealth being thus barred, it follows that the tenant has acquired a valid title by possession, not only to the upland, which is not questioned, but also to the flats, as appurtenant to the upland and wharf, by virtue of the ordinance of 1641; (Anc. Chart. 148;) unless the demandant has proved a prior possession by those from whom he has derived his title. And it is contended that he has proved such a possession, commencing as early as the year 1774, under a deed of conveyance from John Preston to Daniel Preston. In that deed, the premises conveyed are bounded westerly by Sea Street, where it measures sixty feet, and holding the same breadth to low water mark; northerly on land of Richard Hunnewell, and southerly on land of Henry Allen. In what direction the side lines of the flats were to run is not mentioned. They must, therefore, be run in such a direction as to include the flats belonging to the Preston lot. And we adhere to our decision in the case of *Valentine* v. *Piper*, and for the reasons therein stated, that the lines dividing the flats belonging to the lots southerly of Summer Street are to run parallel with the lines of that street.

It has been argued that the deed of John Preston to Daniel Preston is to be so construed as to pass the flats in front of the Preston wharf, in conformity with the side lines of the same, and in conformity, as it is said, with the side lines of the upland. But we cannot so construe the deed. It must be presumed that the deed was intended to pass the grantor's actual right and legal title; the contrary not appearing by express words or necessary implication. This was a deed with warranty; and nothing short of a very clear description would make the grantor liable on his covenant of warranty. Then the side lines of the upland have no influence in deciding the direction of the exterior side lines of the flats; as was decided in *Rust* v. *Boston Mill Corporation*, 6 Pick. 158, and in other cases.

Some reliance was placed on the deed from Blackman to

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Fessenden and others, which describes the flats, belonging to the Blackman lot, as lying between the Preston wharf and the Sumner wharf, and continuing the same width to low water mark. But this deed was dated in 1800, and cannot affect the construction of the previous deed from John Preston to Daniel Preston. Nor indeed would it, if the former deed had been previous to the latter. For, although the flats conveyed by the latter deed are bounded southerly by land of Allen, who then owned the Blackman lot, yet this must refer to land owned by a legal title, and not by an erroneous claim. *Crosby* v. *Parker*, 4 Mass. 110. And besides; if the owner of the Blackman lot did encroach upon the Preston lot, that would not authorize the owner of the latter lot to trespass on the lots northerly; nor could it affect the construction of a prior deed.

Upon the whole evidence, therefore, we are clearly of opinion, that no constructive possession of any part of the demanded premises was acquired before 1784, under the deed from Preston to Preston, nor by any other title deed of the Preston lot, or of the Hunnewell lot. So that if the children and heirs of Elizabeth Price took nothing by descent, on her decease, nor by virtue of the treaties between the United States and England, they have nevertheless acquired the elder and better title to the flats in controversy.

The demandant claims another portion of the flats demanded, as appurtenant to the Clement lot. His counsel contend that there has been an encroachment on the northerly side of that lot, and that although the tenant has thereby acquired, by disseizin, a good title to the upland and wharf, as now held by him, yet that there has been no such open and actual possession of the flats, as will by law constitute a disseizin. Whether this principle is well founded or not, is a question upon which, for the reasons already mentioned, we intimate no opinion. But we are of opinion that the alleged encroachment has not been satisfactorily proved. The question depends principally on ascertaining the original line of high water in front of the Clement lot. If it was as low

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as the eastern line of Sea Street, then it is admitted that a part of the flats demanded were included in the Clement lot. There is, undoubtedly, considerable evidence tending to prove that the high water mark was as low as the east line of Sea Street, and in some places perhaps lower. It has been argued that it is highly probable, if not certain, that the street was laid out above the beach or shore; or that it was so located, when it was narrowed from fifty to thirty five feet. This we think probable, as to the general course of the street. But we are not to suppose that the beach or shore was on a straight line the whole extent of the street; and there is strong evidence to show that there was a cove near Summer Street, where the tide probably flowed above Sea Street.

In the deed of Baxter to Bull, in 1668, a particular description of the land conveyed is given, by which it appears, if the description may be relied on, that high water mark at Summer Street, was then as high up as the west line of Sea Street, as it was afterwards laid out. And this is confirmed by the testimony of Holbrook, and of Dolbeare. Holbrook testified that he recollected the Price wharf sixty years; that on the south side of it the timbers extended nearly up to Sea Street, and passed by a stone wall built on the lot next south, which appeared to have been built to keep the sea from washing away the street; but that the water had washed over and through the wall, leaving a hollow place, the extent of which he did not state. Dolbeare testified that the timbers of Price's wharf extended up to the street, or rather beyond the wall on the Bradlee lot. Fuller, the surveyor, testified that the Clement lines would correspond with the Price lines, if high water came up into the street. Now the burden of proof is on the demandant, to show that high water mark was as low down as the east line of Sea Street. And the most that can be said of the evidence on this point is, that the fact is left doubtful. But when, in addition to this evidence, we take into consideration the presumptive proof arising from the long and undisturbed possession of the wharf and flats in controversy, by the proprietors of the Price lot, we think it satisfac-

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torily negatives the supposed encroachment. Such a possession is strong, and commonly the most satisfactory evidence of rightful claim and legal title. Here there is proved an undisturbed possession of the wharf, for more than a century, by John Bull, the father of Mrs. Price, and by the Price family. But to go back only sixty years, we find that two of the children of Mrs. Price entered on the lot, no one questioning their title, although the family had removed to England thirty years before. In 1795, Thomas Clement purchased the lot adjoining, and afterwards conveyed it to Thomas Clement, jr. neither of whom ever questioned the title of the Prices, or complained of any encroachment. The latter commenced an action against Bradlee, alleging an encroachment on his flats, which action he afterwards dropped; but he never asserted any claim to the flats possessed by the Prices, and afterwards by Valentine. After his death, the demandant took a quit-claim deed from his heirs, in which the flats are described as bounding "northerly by land lately owned by Lawson Valentine;" which must be construed as referring to the land he had purchased of the Prices. So that if the Clement heirs had a title to any part of that land, it probably would not pass by that deed. Of this, however, it is not necessary to express an opinion. For to suppose, after the long possession the Prices have had, that their title, or the title of Mrs. Price's father, commenced by disseizin, and by an encroachment on the Clement lot, is a supposition, to say the least of it, extremely improbable. Most certainly it has not been satisfactorily proved.

The only remaining question to be decided is, whether the tenant's flats are to be limited by a line extended in the direction of the line of his wharf, or by the red line on the plan. And we are of opinion that the latter is the true line, and that his wharf, by mistake or otherwise, on the south side, varied a little from that line, so as to leave a space of one foot and nine inches between them, at the lower end of the wharf. It would not be surprising if this little deviation happened by mistake; though from the evidence we are inclined to think

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otherwise. The space between the southeast corner of the wharf and the red line on the plan might have been left for the purpose of erecting a post there as a fender, and for other uses. There is no proof of this, it is true; but there is proof that the ends of the timbers, at the foot of the wharf, on the sea, extended a little beyond the sides of the wharf, from the street; and that about half way down, on the south side of the wharf, there was an old fender, about eight inches in diameter, at the time when Valentine repaired the wharf, which he spiked to the timbers of the wharf. From this evidence, we conclude that the timbers of the wharf were not on the tenant's south line. Otherwise, the old fender and the ends of the timbers at the foot of the wharf, were on the adjoining lot; which is not to be presumed. And from this consideration, and the other evidence reported, we are of opinion that the red line, laid down on the plan as the south line of the tenant's flats, is the true line; the same being parallel with the lines of Summer Street, which are, we think, satisfactorily ascertained.

In disputes as to ancient lines, it is difficult to ascertain their original location with perfect certainty; but it seems to us, that these lines are ascertained with reasonable certainty. The objection is, that the lines of Summer Street are not clearly ascertained, or, if they are, that these lines, and the divisional side lines of the flats, both on the north and south sides of Summer Street, do not coincide; that Summer Street, as laid out, encroached on the flats of the Price lot; and from this it is inferred that the Prices, or Bull, the father of Mrs. Price, who owned that lot when Summer Street was extended, afterwards pushed his or their claim further south, and encroached on the Clement lot. This objection was made by Bull, as long since as 1710, when he applied to the town for relief. A committee was thereupon appointed to examine into his claim, and they afterwards reported that, after examination of the claim, they found that the wharf then in possession of E. Dorby (being the thing complained of as an encroachment) stood according to the settlement of the select

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men, made about the year 1663, and recorded in the town book. After an acquiescence of more than a century in this report of the committee of the town, it seems quite too late to prove that it was founded on a mistake, unless it could be proved by the most convincing evidence. The location of this wharf, on the north side of Summer Street, is ascertained by the testimony of Fuller the surveyor. He testifies that the old wharf was forty one feet wide, and that he ascertained the north line by timbers there remaining; and that the width of the wharf was ascertained by the old timbers at the jog; and that he ran a line to the corner of the Bull Tavern lot, being the upland of the Dorby or Gill lot, which he found to be parallel with the north line of the wharf, as fixed by the timbers, and to measure forty one feet; and that these lines were parallel to the south line of Summer Street. It is true, that when Fuller made his examination, the wharf which was then standing extended further south; but this was on an irregular line, and could not be the south line of the lot. It is also proved, that the buildings on the Price wharf were on the south line of Summer Street, as laid down on the plan; the street measuring thirty feet, as it was originally laid out. This evidence proves, we think, the accuracy of the plan, as to the lines of Summer Street; and as we adhere to our former decision, that the tenant is entitled to his flats in the direction of these lines, we are of opinion, on the whole matter, that this action cannot be maintained.

*Judgment for the tenant.**

* The judgment was entered as follows: The general issue being pleaded and joined, and a jury having been empannelled for the trial of the said issue, the whole case was, by agreement of parties, taken from the jury, to be presented to the full court, who are authorized to draw any inferences of fact which are warranted by the evidence; and upon the whole matter, the court are to enter a judgment for the demandant or tenant, or send the case to a jury, as they shall be of opinion the law requires; and the case was continued, from term to term, to the present term; when it appearing to the court, by the evidence, that the tenant never did disseize the demandant, in manner and form as he hath alleged in his writ and declaration, it is, according to the said agreement of the parties, considered by the court, that the tenant have judgment for his costs against the demandant.

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William P. Houston *vs.* Thomas Pollard.

By an agreement of submission to arbitration, the arbitrators were to determine between A. and B., 1st, whether A. had finished a certain dwelling-house, according to his contract with B., and what, if any thing, remained to be done upon the house by A., and how much, if any thing, remained to be paid by B. to A., and what damage, if any, should be deducted and allowed to B. for the failure of A. to perform the agreement to build the house; 2d, to determine and decide what amount, if any, remained to be advanced by B. to A., and what remained to be done, if any thing, by A., upon a certain other dwelling-house, to finish it, conformably to another contract between him and B.; and the parties agreed to do and perform to each other whatever might be ordered, by the arbitrators, to be done by them respectively. The arbitrators awarded that B. should pay a certain sum to A. in fulfilment of the contract for building the first mentioned house, and that another certain sum remained to be advanced by B. to A. in fulfilment of the contract for building the other house. *Held*, that the arbitrators had not decided all the matters submitted to them, and that their award was therefore bad.

Assumpsit on the following agreement, made between the plaintiff and defendant on the 30th of March 1842:

"Whereas the said Pollard and Houston did, on the 29th of October 1840, make and execute an agreement in writing, under seal, wherein and whereby the said Houston contracted to build a dwelling-house and out buildings for the said Pollard, and upon the land of the said Pollard, as therein is set forth and expressed: And whereas a certain bill for materials furnished and labor done upon said dwelling-house and out buildings, by the procurement of the said Pollard, hath been exhibited and claimed by the said Pollard, which is hereunto annexed, and certain charges for extra work and materials have been made by the said Houston, as done and furnished for said house: And whereas the said Pollard alleges that the work and materials done and furnished by said Houston, upon said house, are bad and defective, and the said Houston alleges that the claims of the said Pollard are not justly due and allowable: Now it is hereby agreed, that all the said matters in dispute between the said Pollard and the said Houston, and all matters respecting the building of the said houses, and as to the time, mode and amount of payment, if any, to be made by the said Pollard, and all other claims arising or accruing to either party from or under the said

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contract, shall be referred to Horatio M. Willis, Jonathan Preston and Aaron D. Webber, who shall hear the parties, their allegations and evidence, and shall determine upon all the matters above referred to them, and whether the said dwelling-house and out buildings are done and finished according to the true intent and meaning of said agreement, or such modification thereof as has been agreed to by the parties, and what, if any thing, remains to be done by the said Houston upon the same, and whether any thing, and how much, remains to be paid by the said Pollard to the said Houston, and what damages, if any, are to be deducted and allowed to the said Pollard, for the failure by the said Houston to finish said work by the time named in said agreement, and what damages are to be allowed to said Houston, for the failure of said Pollard to perform any agreement, on his part to be performed, agreeably to said contract or modification thereof.

"And whereas by a certain other agreement in writing, under seal, made, and interchangeably executed, between the said Pollard and the said Houston, bearing date of the same 29th of October 1840, the said Houston did covenant and agree with the said Pollard, that he, the said Houston, should and would build and erect, upon a piece of land situated upon Utica Street in said Boston, and to said Pollard belonging, but thereafterwards to be conveyed to the said Houston, a dwelling-house, agreeably to the stipulations and particulars, as in said sealed agreement is set forth: And whereas a bill for materials furnished, labor done and advances made, by and in behalf of said Pollard, hath been presented and claimed of the said Houston, and is hereunto annexed: And whereas it is asserted, by the said Houston, that the said last named dwelling-house is now completed and finished, agreeably to the provisions and stipulations, and the true intent and meaning, of the said last named sealed agreement, and the alterations and variations of the said agreement, assented to and agreed upon by the said parties, all which is denied by the said Pollard: Now it is hereby agreed, that all the said matters and things, so in dispute and controversy between the

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said Pollard and Houston, and all other matters and things which may be brought into controversy, concerning the finishing of the said dwelling-house, agreeably to the said last named sealed instrument, and all claims and liabilities arising out of said contract or variations thereof, which may be in dispute between the said parties, shall be referred to the same Horatio M. Willis, Jonathan Preston and Aaron D. Webber; and they shall decide what amount still remains to be advanced by the said Pollard to the said Houston, if any thing, and what remains to be done upon the said last named dwelling-house, if any thing, to finish and complete the same in conformity to said sealed agreement, and such alterations and variations thereof as may be proved to have been agreed to by the said parties.

"And in determining all matters so in controversy between the parties, and hereby referred, as to both the said contracts, the said referees shall be guided by the said contracts and such alterations and variations thereof as have been agreed upon by the parties, and the evidence given them, and may refer to the claims exhibited by the parties respectively; and their award and determination, or the award and determination of a major part of them, shall be final and conclusive between the parties; and the parties and persons aforesaid do covenant and agree, each with the other, that they will do and perform, each to the other respectively, whatsoever may be ordered and directed by the said referees, by them to be done and performed respectively, touching all matters and things herein and hereby submitted to them; but the parties hereto do not submit to the said arbitrators to decide what sort or form of a deed or deeds shall or ought to be given by one party to the other, or from each to the other, agreeably to the true intent and meaning of the said instrument last above named, nor when, if ever, any such deed should or ought to be made or delivered.

Thomas Pollard,
William P. Houston."

The plaintiff's declaration set forth an award under the foregoing agreement of submission, which was in these terms:

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"We, the subscribers, referees named in the annexed agreement, having notified, met and heard the parties to said agreement, and carefully and duly examined and considered the allegations, evidence and arguments by them severally offered, and also the contracts, and the several matters and things in the said annexed agreement referred to mentioned, expressed and set forth, do award, arbitrate and determine, of and concerning the premises and the whole subject matter thereof, that the said Thomas Pollard pay to the said William P. Houston, in fulfilment of the contract for building the northerly house on Utica Street, first mentioned in the agreement hereto annexed, the sum of $666·89; and that there remains to be advanced, by said Pollard to said Houston, in fulfilment of the contract for building the southerly house on said Utica Street, the sum of $248·16. And we do further award that the referees' services, taxed at $140, be paid equally between the said parties, and that each party pay his own witnesses" (Signed by all the referees, and dated July 24th 1842.)

The plaintiff's declaration averred that said referees published said award and gave notice thereof to the defendant; that the plaintiff, before commencing this suit, requested the defendant to perform said award; but that the defendant refused so to do.

The case was submitted to the court upon the said agreement of submission and said award, which were admitted to be as above set forth, and upon the other averments in the plaintiff's declaration, which the defendant admitted to be therein truly made. And it was agreed that the court might direct a nonsuit or default, or a trial by jury, or make such other order in the case, as, in their judgment, law and justice might require.

The argument was had at the last March term.

H. H. Fuller & Andrew, for the defendant. It does not appear, from the award, whether the second house is finished, nor what remains to be done upon it. This might not be fatal, if the particulars had not been specified in the submission. But here it appears, on the face of the award, that all

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matters submitted have not been decided. *Stone* v. *Phillipps*, 4 Bing. N. R. 37. *Randall* v. *Randall*, 7 East, 81. *Auriol* v. *Smith*, 1 Turn. & Russ. 128, 129. *Robson* v. *Railston*, 1 Barn. & Adolph. 723. Kyd on Awards, (2d ed.) 194. Caldwell on Arb. 103, 104. Unless it expressly appears, by the award, that all the matters submitted have been decided, or unless the implication that they have been decided is unavoidable, the award is bad. Here there is no such implication. The case of *Rider* v. *Fisher*, 5 Scott, 86, and 3 Bing. N. R. 874, cannot be distinguished from the case at bar. There the arbitrators were to determine on all claims, differences and disputes relating to alleged defects and imperfections in a building, and relating to the accuracy of claims for extra work, and deductions for omissions, and to ascertain what balance, if any, might be due to the builder. The award was, that a certain sum should be paid to the builder, and received by him, in full satisfaction of all matters in difference between the parties, and referred by them. The award was held to be bad. Tindal, C. J. said, "the arbitrators have not done that which they were required to do. There are three distinct subjects matter upon which they were called upon to decide; the alleged defects and imperfections in the building, the charge made for extra work and deductions for omissions, and the balance due in respect of those extras and omissions. Two of these they leave altogether untouched; and they have left it uncertain whether the balance they direct to be paid is a general balance, or confined to the balance of the account for extras and omissions."

Whiting, for the plaintiff. Every reasonable intendment is made, in the modern cases, in favor of an award, and the ancient niceties are disregarded. *Richards* v. *Brockenbrough*, 1 Rand. 449. *Coupland* v. *Anderson*, 2 Call, 106. *King* v. *Cook*, Charlt. 287. *Archer* v. *Williamson*, 2 Har. & Gill, 62. *Karthaus* v. *Ferrer*, 1 Pet. 222. Watson on Arb. 102. What the arbitrators say shall be done is to be done, and what they omit to say shall be done is not to be done. They need not state the process by which they come to their result. It will

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be intended that arbitrators have decided on all matters referred to them, unless the contrary clearly appears, even when they do not state that they have awarded "of or concerning the premises." *A fortiori*, will this be intended when they do thus state, as in the case at bar. *Crofton* v. *Connor*, 1 Bro. P. C. (2d ed.) 530. *Gray* v. *Gwennap*, 1 Barn. & Ald. 106. *Day* v. *Bonnin*, 3 Bing. N. R. 219. *Duckworth* v. *Harrison*, 4 Mees. & Welsb. 445. *Cargey* v. *Aitcheson*, 2 Barn. & Cres. 170. *Dunn* v. *Warlters*, 9 Mees. & Welsb. 293. *Pearse* v. *Pearse*, 9 Barn. & Cres. 484. *Hallyar* v. *Ellis*, 3 Moore & Payne, 553. *Taylor* v. *Shuttleworth*, 6 Bing. N. R. 277. *Brown* v. *Croydon Canal Co.* 9 Adolph. & Ellis, 522. *Gaylord* v. *Gaylord*, 4 Day, 422. *Emery* v. *Hitchcock*, 12 Wend. 156. *Caton* v. *MacTavish*, 10 Gill & Johns. 193.

Shaw, C. J. The court are of opinion that the award is not valid and cannot be supported. The arbitrators have not found whether any thing remained to be done, towards the completion of the houses, according to the contracts which were referred to them; especially respecting the second house, which was alleged not to be finished.

We take the rule to be, that when the claims on both sides are for debts, or pecuniary claims, or for damages capable of being liquidated, ascertained, and reduced to a sum certain, if the arbitrators, professing to decide on the whole subject, find a balance due to the one from the other, such an award is final and conclusive, although the particulars, from which that balance resulted, are not stated. And in this case, had it been left to the arbitrators, not to direct the specific performance of any acts for completing and finishing the buildings according to contract, but to assess damages for all deficiencies, we are inclined to think the award of a balance to be paid would have been good. But even if it was within their authority to find damages for the non-performance of the contract, in finishing and completing the buildings, instead of directing a specific performance of the contract, by making good the deficiencies, yet it was clearly within their authority to direct such things to be done specifically; and the parties

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stipulated to do and perform what should thus be directed. Now this award, finding a balance on the pecuniary claims, leaves it wholly uncertain, whether the arbitrators decided on the fact that there was or was not any such deficiencies, and if there were, that they allowed any compensation for them, in damages, in stating the balance of the account. We think it would be carrying the doctrine of intendment too far, to assume that they decided against all claims for specific performance on both sides, merely because they have said nothing on the subject; nor is the award aided by the general statement that they have made their award "of and concerning the premises, and the whole subject matter thereof." It must appear, on the award, with reasonable certainty, what the rights of the parties respectively are, so as to prevent future controversy and litigation. Should actions now be brought on the original contract, for alleged breaches, in not performing the stipulations therein contained, the defendant could not hold up this award as a bar, and show clearly therefrom that the subject matter of such breach had been passed upon and decided by arbitrators mutually chosen. Without referring to the numerous authorities cited in the full and able argument, one recent case appears to us to be in point. *Rider* v. *Fisher*, 3 Bing. N. R. 874, and 5 Scott, 86.

Plaintiff nonsuit.

FRANCIS A. SAWYER *vs.* JABEZ PRATT.

By *St.* 1840, *c.* 87, §§ 4, 5, the instructions given to a jury by the court of common pleas, in the trial of an issue joined on a rejoinder to a replication to a plea in abatement, are not the subject of a bill of exceptions.

THIS was an action of replevin. The writ was directed to, and served by, a coroner; the defendant being therein described as a deputy of the sheriff of the county of Suffolk. The defendant pleaded in abatement, that said sheriff was not, at the time of the service of the writ, a party to, nor interested

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in, the case, and that the officer who served the writ was not, at the time of the service, a sheriff, nor a deputy sheriff, and therefore was not authorized by law to serve the same. The plaintiff's replication alleged that the sheriff of Suffolk was, at the time of the service of said writ, and still is, interested in the case, and that the coroner, who made said service, was by law authorized to make it. The defendant, in his rejoinder, denied the interest of said sheriff in the case, and tendered an issue to the country, which was joined by the plaintiff.

At the trial, in the court of common pleas, the plaintiff, to show the interest of the sheriff, as alleged in said replication, introduced evidence of the following facts: 1st. That the defendant, at the time of the service of said writ, and long before, and at the time of said trial, was a deputy of the sheriff of Suffolk: 2d. That said sheriff, on the 11th of April 1839, gave a bond, with sureties, to the treasurer of the Commonwealth, in the sum of $30,000, conditioned, among other things, to "respond and answer for the malfeasance and nonfeasance of all and each of his deputies:" 3d. That the property replevied in this suit was attached by the defendant, as acting deputy sheriff, as the property of John Cushman, by virtue of a writ sued out against him by Henry Hammond.

Upon this evidence, the court instructed the jury, that the sheriff was interested in this case, at the time of the service of the writ, and at the time of the trial; and a verdict was returned for the plaintiff, conformably to said instruction The defendant alleged exceptions.

Wheelock, for the defendant.

A. Cushing, for the plaintiff.

Shaw, C. J. It is very clear that this case is not rightly before this court, by bill of exceptions. Nor could it be brought up by appeal. *St.* 1840, *c.* 87, §§ 4, 5. In allowing bills of exceptions, and appeals, founded on matter of law apparent on the face of the record, judgments founded on pleas in abatement are expressly excepted.

It was argued, however, that a distinction may be taken, that here an issue in fact was joined and tried. But that can

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make no difference. The judgment must be that the writ be or be not abated, and therefore is founded on the plea.

It was intimated, as another distinction, that, in this case, the bill of exceptions embraced partly matter of fact and partly law. If it was so, it is quite certain that the exceptions were irregularly taken, and improvidently allowed; and any appeal, in such case, without reference to its being on a plea in abatement, is prohibited by the *St.* 1840, *c.* 87, § 4. The exceptions are overruled, and the cause remanded to the court of common pleas.

[After this action was tried in the court of common pleas, it was decided, in *Browning* v. *Bancroft*, 5 Met. 88, that a sheriff is not so interested in an action of replevin brought against his deputy, for property attached by him, as to authorize a coroner, under Rev. Sts. *c.* 14, § 97, to serve the writ of replevin on the deputy.]

JOSEPH W. CUMMINGS & another *vs.* HORATIO SARGENT & another.

The owners of a tavern, by an instrument in which they recited that they had engaged R. to keep said tavern, empowered him, for them, and in their names, and for their use and benefit, to transact all business pertaining to said tavern, which, in his judgment, might promote their interest, and "to purchase, use and vend all necessary provisions for said house." *Held*, that R. was authorized to purchase spiritous liquors, wine and sugar, on the credit of the owners, to be used at the bar of said tavern.

ASSUMPSIT for gin, brandy, rum, wine and sugar, sold and delivered to the defendants. There was also a count for the same articles sold and delivered to Amos Russell, as the agent of the defendants.

At the trial, in the court of common pleas, before *Merrick*, J. it appeared that said articles were purchased of the plaintiffs by Amos Russell, to be used at the bar of the defendants' tavern, in Deerfield, and that they were so used. The only authority which Russell had, to make said purchase, was contained in an instrument executed by the defendants, as follows: "Whereas we have engaged Amos Russell to keep

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the public house, and cultivate the farm appertaining to the same, in Deerfield; the said house and farm being the same that the said Russell formerly owned; now, therefore, be it known to all men, that we do, by these presents, make, constitute and appoint the said Amos Russell our true and lawful agent or attorney, for us and in our names, and for our use and benefit, to transact all business pertaining to said house and farm, that, in his judgment, may promote our interest; under this head, we authorize and empower the said Russell to purchase, use and vend all necessary provisions for said house; all necessary hay, straw and grain, beside what hay, straw and grain said farm may produce; all necessary horses, and cattle necessary for use in the premises," &c "And further, we authorize and empower the said Russell, in all things relating to the premises, to act for us as fully and effectually, to all intents and purposes, as we could, might or ought, were we personally present.

Horatio Sargent. (seal.)

April 1st 1842. Obadiah Dickinson. (seal.)"

The defendants contended that this instrument did not authorize Russell to make said purchase on their credit. But the judge ruled otherwise, and instructed the jury that the defendants were liable in this action. A verdict was returned for the plaintiffs, and exceptions were filed by the defendants.

R. A. Chapman & Ashmun, for the defendants. Authority was not given to Russell, by the letter of attorney, to purchase any articles, to an indefinite extent, on the credit of the defendants; Story on Agency, §§ 77, 78; certainly not liquors and sugars to be retailed in a bar room. The general authority to "transact all business pertaining to said house and farm," was qualified and restricted, as to purchases, by these words; "under this head we authorize and empower the said Russell to purchase, use and vend all necessary *provisions* for said house," &c. They thus expressly limited his power of purchasing in their names to the purchase of provisions for the house. *Expressio unius est exclusio alterius.* Chit. Con. (5th Amer. ed.) 88. The only question then is, whether liquors

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and sugars, to be used in a bar room, are provisions, within the meaning of the letter of attorney. Nothing in that instrument implies that the defendants intended that Russell should retail mixed liquors on their account.

Brigham, for the plaintiffs, cited 1 Livermore on Agency, 105. Story on Agency, §§ 58, 165, 226. *Codwise* v. *Hacker*, 1 Caines, 540. *Williams* v. *Mitchell*, 17 Mass. 98. *Withington* v. *Herring*, 5 Bing. 442. *White* v. *Westport Cotton Manuf. Co.* 1 Pick. 220. *Tappan* v. *Bailey*, 4 Met. 529. *Emerson* v. *Providence Hat Manuf. Co.* 12 Mass. 237.

The Court overruled the exceptions, and ordered judgment to be rendered on the verdict for the plaintiffs.

Mary A. Pinkham, Executrix *vs.* Josiah Macy.

A notice to the indorser of a note, which merely states that the note remains unpaid, and that the holders look to him for payment, is not sufficient to charge the indorser, although such notice is given by a notary public.

Assumpsit on the following note, held by the plaintiff, as executrix of the last will of Seth Pinkham, to whom it was indorsed by the payee: "Nantucket, April 1st 1837. At the termination of the ship Obed Mitchell's present voyage, for value received, I promise to pay to the order of Josiah Macy eight hundred and fourteen dollars and forty one cents, with interest till paid. James Mitchell."

At the trial in the court of common pleas, at Nantucket, before *Ward*, J. the signatures of the maker and indorser were admitted; and the plaintiff, to prove demand on the maker, and notice to the defendant as indorser, called J. M. Bunker, a notary public, who testified that the defendant had always resided in Nantucket; that Mitchell, the maker, resided there at the date of the note, but that he removed his business and family to the city of New York, before the arrival of the ship Obed Mitchell; that said ship arrived at the bar of Nantucket, on Sunday, June 27th 1841; that the

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witness, on the next day, took said note, as notary public, and went to the place of business formerly occupied by the maker, in Nantucket, and found it closed; that he then went to the house formerly occupied by the maker, in Nantucket, and found another family residing there, but then presented the note and demanded payment thereof, which was refused; and that he thereupon made and gave to the defendant this notice: "Nantucket, June 28th 1841. Please to take notice that a promissory note for $814·41, with interest, dated October 1st 1837, payable at the termination of ship Obed Mitchell's voyage, now completed, signed by James Mitchell, and indorsed by you, remains this day unpaid, and that the holders look to you for payment thereof. Done at the request of Seth Pinkham. James M. Bunker, Notary Public. (Seal.)

"To Josiah Macy."

The judge ruled that said notice was not sufficient to charge the indorser; and the jury found a verdict for the defendant The plaintiff alleged exceptions to said ruling.

Coffin, for the plaintiff.

Colby, for the defendant.

SHAW, C. J. The question is, whether due notice was given to charge the indorser. This subject was so fully discussed in the recent case of *Gilbert* v. *Dennis*, 3 Met. 495, that it seems only necessary to inquire whether this case falls within the principles laid down in that case. The rule there laid down was, that the notice must be such as to inform the indorser, either in terms or by reasonable implication, that the note was dishonored, that is, that it had been presented for payment, and payment refused, or other act done, which by law is deemed equivalent. It is not necessary to state what has been done; whether an actual demand was made, or that the note lies over at a bank where, by contract or by usage, it was payable, or that the maker has absconded. All this is matter of proof afterwards, to show the fact of dishonor. But the notice must be such as to assert or imply that the note has been presented and payment refused, or otherwise dishonored. It was also stated, that a notice simply that the

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now is unpaid is sufficient, where, from the terms of the note, non-payment and lapse of time constitute such dishonor. So, when a note is payable at a bank, it is the duty of the maker to pay it at the bank, on the last day of grace. Then a notice dated after bank hours, on that day or the next day, simply informing the indorser, who is presumed to know the terms and purport of the note, that it is, at that time, unpaid, is notice of dishonor. But in case of a note not payable at a place certain, where presentment or inquiry is necessary, in order to make a demand, such a notice, either on or after the day of payment, is not, in terms, or by intendment or implication, notice that it has been demanded, or that it is dishonored.

In the present case, all that was stated in the notice might be strictly true, though no presentment and demand had been made, and though the maker had not left the island, and no inquiry for him had been made. It is, therefore, exactly within the case of *Gilbert* v. *Dennis*. It was suggested, in the argument, that there is a difference, because, in the present case the notice was given by a notary public. But this can make no difference in principle; and we think it would not be expedient for the community that a rule of law so universally important should depend on new or slight distinctions. A notary public, in such case, is the mere agent of the holder. His service is not required, as in case of a foreign bill of exchange, to make a protest. *City Bank* v. *Cutter*, 3 Pick. 414.

A case may happen, where a reference to a protest by a notary public, which term implies a demand and refusal, may be important, because it intimates, by implication, that the note has been dishonored: As where the notice of non-payment is accompanied with notice that the holder looks to the indorser for payment, with *costs*, or *fees*, or *charges* of protest. This may be sufficient to show, by reasonable intendment, that it has been protested for non-payment, which is notice of dishonor. But the present notice carries no such implication, but is a simple notice of non-payment, without intimation of dishonor

There seems to be another good ground of defence, namely,

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that the demand and notice were too soon. If the arrival of the ship at Nantucket was not the termination of the voyage, then they were too soon. If it was such termination, then it became a day certain, and the note was entitled to grace.

Exceptions overruled.

CHARLES F. GARDNER & another *vs.* DAVID JOY.

A. asked B. what he would take for candles; B. said he would take twenty one cents per pound; A. said he would take one hundred boxes; B. said the candles were not manufactured, but he would manufacture and deliver them in the course of the summer: No written memorandum was made of this bargain. *Held*, that this was a contract for the sale of goods, within the statute of frauds — Rev. Sts. c. 74, § 4.

IN an action of assumpsit, the plaintiffs alleged, in the first count in their declaration, that the defendant, on the 20th of April 1843, in consideration that the plaintiffs then promised him to pay him twenty one cents per pound, for one hundred boxes of good merchantable sperm candles, each box to contain 33⅓ pounds, when said candles should be manufactured by the defendant, and delivered to the plaintiffs, undertook and promised the plaintiffs, that he would manufacture and deliver to them one hundred boxes of such candles, each box of the weight aforesaid, and that the same should be manufactured and delivered to them in the summer following, viz. in the months of July and August then next; that the plaintiffs were ready to receive and pay for said candles; that they tendered the price thereof to the defendant, and demanded of him a delivery thereof; and that he refused to manufacture and deliver them to the plaintiffs.

The plaintiffs' second count set out a bargain, on the same 20th of April 1843, by the plaintiffs with the defendant, to buy of him, and that he then sold to them, one hundred boxes of candles, (describing them, as in the first count,) to be delivered by the defendant during the summer following, to be paid for by the plaintiffs, on delivery thereof; that the plaintiffs had always been ready to receive and pay for said can

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dles, according to their said bargain; yet that the defendant had refused to deliver said candles, or any part thereof, to the plaintiffs.

The trial was in the county of Nantucket, before *Hubbard*, J. who made the following report thereof: To sustain their action, the plaintiffs called Edward G. Dillingham, as a witness, who testified that he was present at a conversation between Gardner, one of the plaintiffs, and Joy, the defendant; that Gardner asked Joy what he would take for candles, and he said twenty one cents; and that Gardner said he would take one hundred boxes; and the witness understood that the bargain was completed; that the precise time for their delivery was not stated; that Joy said they were not manufactured, but he should or would manufacture them and deliver them to him in the course of the summer.

The plaintiffs also called Nathaniel Ruggles, who testified that he was at the defendant's house in the autumn of 1843, and asked the defendant when the bargain was made between him and Gardner; and that the defendant, on examining a memorandum book, said that some time in April 1843 he sold Gardner & Cottle (the plaintiffs) one hundred boxes of candles, to be delivered to them some time in the summer, at twenty one cents per pound.

The jury were instructed, that if they were satisfied that there was no note or memorandum in writing of the bargain, signed by the party to be charged thereby, the action could not be sustained upon the evidence, as the case was within the statute of frauds — Rev. Sts. *c.* 74, § 4: That this was a contract for the sale and delivery of goods, and not for the manufacture and sale of goods; and that it would have been a sufficient compliance with the contract, if the defendant had been ready and offered to deliver one hundred boxes of good merchantable sperm candles of 33⅓ pounds to the box, though they had not been of his own manufacture. A verdict was returned for the defendant.

Judgment to be entered on the verdict if the said instruction was right; otherwise, a new trial to be ordered.

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Coffin, for the plaintiffs.

Colby, for the defendant.

SHAW, C. J. Difficult questions frequently arise under the clause, in the statute of frauds, (Rev. Sts. *c.* 74, § 4,) which provides that "no contract for the sale of any goods, wares or merchandize, for the price of fifty dollars or more, shall be good or valid, unless" (among things not material in this case) "some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." But the difficulty arises, not so much from any uncertainty in the rule, as from the infinitely various shades of different contracts. If it is a contract to sell and deliver goods whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute. *Spencer* v. *Cone*, 1 Met. 283. *Mixer* v. *Howarth*, 21 Pick. 205.

In the present case, the question as to the nature and terms of the contract depends on the testimony of one witness, who testified as follows: [Here the chief justice recited the testimony of Dillingham, as stated in the report of the trial.] The presiding judge instructed the jury, that if they were satisfied that there was no note or memorandum in writing, (a fact to be decided by them on the evidence,) the action could not be sustained, being within the statute of frauds.

The court are of opinion that this instruction was right. It was essentially a contract of sale. The inquiry was for the price of candles; the quantity, price and terms of sale were fixed, and the mode in which they should be put up. The only reference to the fact, that they were not then made and ready for delivery, was in regard to the time at which they would be ready for delivery; and the fact, that they were to be manufactured, was stated as an indication of the time of delivery, which was otherwise left uncertain. There was some question, whether Joy used the term *would* or *should* manufacture them in the course of the summer; but the meaning, we think, is the same. Whether, after stipulating for the terms

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of sale, except the time, the question was at what time they would be delivered, and he said, I *will* manufacture them, or *shall* manufacture them, in the course of the summer; either would be the annunciation of a fact, indicating and fixing the time of delivery. The case seems not to be distinguishable from that of *Garbutt* v. *Watson*, 5 Barn. & Ald. 613, where the contract by the plaintiffs, who were millers, was for the sale of one hundred sacks of flour, to be got ready in three weeks, the flour not being prepared at the time, so as to be capable of delivery. It was held to be a contract of sale, and within the statute.

Judgment on the verdict.

JAMES CUSHING & others *vs.* ANTOINETTE D. C. FIELD, Administratrix.

An appeal does not lie from the judgment of the court of common pleas, dismissing an action.

An administrator of an insolvent estate can defend a suit brought against him for a debt due from his intestate, only by showing an account of administration settled in the probate court, under Rev. Sts. *c.* 66, or by regular proceedings in insolvency, under Rev. Sts. *c.* 68.

THIS was an action of assumpsit for goods sold and delivered, and money had and received, brought against George Field, the defendant's intestate, and entered in the court of common pleas in his life time.

The defendant, on being cited to take upon herself the defence of the action, appeared and pleaded that "the plaintiffs ought not to have or maintain their said action thereof against her, because she has fully administered the goods and chattels which were of the said deceased, at the time of his decease, and she has no goods or chattels which were of the said deceased, at the time of his decease, in her hands, to be administered." The plea concluded with a verification, and prayed "judgment if the said plaintiffs ought to have their said action against her."

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The plaintiffs replied thus: "As to the plea of the said administratrix, by her above pleaded, inasmuch as they cannot deny the said several allegations of the said administratrix, in her said plea, they pray judgment and their damages, sustained on occasion of the not performing the said several promises and undertakings in their declaration contained, to be adjudged to them, to be levied of the goods and chattels, which were of the said George Field, at the time of his death, or which, since pleading the above plea, may have come, or which may hereafter come, to the hands of the said administratrix to be administered."

The court of common pleas ordered that the action be dismissed, and the plaintiffs appealed to this court.

Goodrich, for the plaintiffs.

Park, for the defendant.

SHAW, C. J. This case comes before us irregularly. No appeal lies from a judgment dismissing a suit. Perhaps the party might obtain a revision of the grounds upon which the dismissal is founded, by a bill of exceptions.

The plea of *plene administravit* should not have been admitted. By St. 1836, *c.* 273, "no other plea in bar," besides the general issue, can be pleaded in the court of common pleas, or in this court. The defendant should have pleaded the general issue and filed a statement in writing, setting forth, as the matter of her defence, the facts which, by the Rev. Sts. *c.* 66, §§ 12–14, entitle her to be discharged. If she has settled an administration account in the probate court, from which it appears that the whole estate and effects of the intestate, which have come to her hands, have been exhausted in paying charges of administration, &c., then she has a good defence. But if she has rendered no such account, and especially if she has not returned an inventory, then her only defence will be a representation of insolvency. It is only by an inventory and an account, and by regular proceedings in the probate court, that an administrator can defend a suit on the ground of the insolvency of the estate of his intestate. Rev. Sts. *c.* 68; *c.* 64, § 5; *c.* 65, § 1.

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A judgment of assets *quando acciderint* could never be entered in this case, because a preference would thereby be given to the plaintiffs, contrary to the Rev. Sts. *c.* 68, § 1, which require that all the debts shall be paid ratably. See 6 Dane Ab. 144.

Appeal dismissed

EDMUND BAKER & others *vs.* THE PRESIDENT, DIRECTORS, &c. OF THE ATLAS BANK & others.

The provision in the Rev. Sts. *c.* 36, § 30, that "if any loss or deficiency of the capital stock in any bank shall arise from the official mismanagement of the directors, the stockholders at the time of such mismanagement shall, in their individual capacities, be liable to pay the same," does not enable the creditors of the bank to maintain a suit against the stockholders, to recover payment of their demands against the bank. And if the stockholders were liable to a suit of the creditors, under that section, it would be barred by the statute of limitations, (Rev. Sts. *c.* 120, § 1,) in six years from the time of the loss or deficiency of the capital stock.

THIS was a bill in equity, brought not only in behalf of the plaintiffs, but also in behalf of all other creditors of the Nahant Bank, and was filed on the 15th of April 1843.

The bill, after alleging the incorporation of said bank, by *St.* 1833, *c.* 144, the organization of the corporation, its transaction of business, and the repeal of its charter by *St.* 1837, *c.* 214, contained the following statements: That by a decree of this court, passed on the 15th of April 1838, in a suit wherein the Atlas Bank was complainant and the said Nahant Bank was respondent, three persons (who were made parties to the bill, as defendants,) were appointed receivers and trustees of the estate and effects of the said Nahant Bank, pursuant to law; (Rev. Sts. *c.* 44, §§ 8 – 10;) and that their powers were still continued: That by an order of this court, passed in the suit aforesaid, it was referred to said receivers to report to this court what persons and corporations were creditors of said bank, and the amount of their respective claims: That said receivers, pursuant to said order, made their report, which was confirmed by a decree of this court, passed in July 1843:

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That by said report the plaintiffs were declared, and by said decree were adjudged to be, and still are, creditors of said bank, respectively, for the amounts following: [Here the sum due to each of the plaintiffs was stated, and reference was made to the proceedings of the court, by which, as it was alleged, it appeared that numerous other persons were creditors of said bank.] That the assets of said bank were insufficient to pay the said creditors; and that, on or before the 16th of November 1836, the whole of the capital stock of said bank was lost by reason of the official mismanagement of its directors.

The bill then set forth the names of bodies corporate, and of individuals, (including the Atlas Bank and other defendants,) that were stockholders of said Nahant Bank at the time or times of the official mismanagement aforesaid, and also the names of divers persons, resident out of the Commonwealth, who were holders of stock in said bank when its charter expired by the repeal thereof as aforesaid.

The bill then alleged, that the plaintiffs had requested the aforesaid receivers, as representatives of all the creditors of said bank, to cause the said stockholders to make good the loss of the capital stock of said bank, caused by the mismanagement of its directors, and to institute a suit to compel restitution of said capital in case of a refusal by said stockholders so to do; but that said receivers refused to comply with said request, and said stockholders refused to make good said capital, or to pay in any part thereof.

The plaintiffs, after setting forth the particulars of the mismanagement of the directors of the Nahant Bank, whereby the capital thereof was lost, prayed that the defendants might answer the matters charged in the bill; that an account might be taken of all losses of said capital stock, through such mismanagement, and also an account of all the debts due from said bank and remaining unpaid, and of the assets of said bank in the hands of said receivers; that all the creditors of said bank, in whose behalf the bill was filed, might have leave to come in and prove their claims, and become parties

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to this suit; and that the defendants might be decreed to pay in so much of the said losses, not exceeding the whole of said capital stock, as should be sufficient to pay in full, with interest, the claims of the creditors of said bank, who are, or may become, parties to this suit; and that the fund, so raised, might be distributed among such creditors, in proportion to their respective claims. There was also a prayer for such further and other relief as should seem to the court to be meet.

The defendants, insisting upon every objection to the bill, which might be insisted upon by way of demurrer or plea, made answer, in substance as follows: 1. That the bill is founded on the Rev. Sts. *c.* 36, § 30, which provide that "if any loss or deficiency of the capital stock of any bank shall arise from the official mismanagement of the directors, the stockholders at the time of such mismanagement shall, in their individual capacities, be liable to pay the same; provided, that no stockholder shall be liable to pay a sum exceeding the amount of the stock actually held by such stockholder at that time;" but that the bill cannot be maintained on said provision. 2. That if the bill could be maintained, on said provision, at any time, yet, as it was not filed until the 15th of April 1843, and as it alleges that the whole of the capital stock of the Nahant Bank was lost, by reason of the mismanagement of its directors, on or before the 16th of November 1836, the plaintiffs' cause of action, if any, against the defendants, was barred, before the bill was filed, by the statute of limitations — Rev. Sts. *c.* 120, § 1.

By agreement of the parties, the case was argued on the preliminary questions raised by the answer.

Gardiner, for the defendants. 1. The 30th section of *c.* 36 of the Rev. Sts. was not intended to compel stockholders to pay the creditors of an insolvent bank, after its charter expires or is repealed, but to compel them to restore to the bank, while in operation, the capital which may be lost through the mismanagement of its directors; so as to prevent the insolvency of the bank, and keep it in safe operation. The section

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was taken from *St.* 1828, *c.* 96, § 12, where it was introduced from the act incorporating the State Bank — *St.* 1811, *c.* 84, § 3, art. 13. When this provision was first made, (in 1811,) the proceedings under it must have been at law, for the court then had no chancery power on the subject. The proper proceeding would have been by mandamus to the corporation to call on the stockholders to make up the lost capital. Angell & Ames on Corp. (2d ed.) 571. And this mandamus must have been obtained before the expiration of the charter of the bank; for it was not until the passing of *St.* 1819, *c.* 43, that banks were continued bodies corporate, for the term of three years after the day on which their powers would expire, for the purpose of prosecuting and defending suits, &c.

The 30th section, on which this bill is founded, gives to creditors of the bank no right of action, in express terms, against the stockholders. The stockholders are not charged with the debts of the corporation, but with the loss of its capital stock. They "shall pay the same," i. e. the loss. Pay to whom? To the corporation, which has sustained the loss. And this they are to do, as well when the whole capital is lost, as when there is "*any* loss or deficiency." The 31st section expressly charges stockholders with payment of the bills of the bank after its charter has expired, if not otherwise paid. If such had been the meaning of § 30, it would have been so expressed. If the creditors' remedy, under that section, was to continue after the expiration of the charter and the dissolution of the bank, why was it not confined to creditors other than bill holders, as § 31 is confined to bill holders only?

In *Harris* v. *First Parish in Dorchester*, 23 Pick. 112, the only point decided was, that an action at law does not lie in a case like the present. The *dictum* of *Morton*, J. that the creditors of the bank had a remedy by bill in equity, was extrajudicial.

2. But if a bill like this could ever have been maintained, it is barred by the statute of limitations. By Rev. Sts. *c.* 120 § 1, "all actions of debt founded upon any contract, or liabil-

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ity not under seal, excepting such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other State, and all actions of assumpsit, or upon the case, founded on any contract or liability, express or implied, shall be commenced within six years next after the cause of action shall accrue, and not afterwards." This statute applies to suits in equity, no less than to actions at law. *Farnam* v. *Brooks*, 9 Pick. 243. *Hovenden* v. *Lord Annesley*, 2 Scho. & Lef. 629. *Medlicott* v. *O'Donel*, 1 Ball & Beat. 166. The cause of action against the stockholders accrued as early, at least, as November 16th 1836. See 2 Story on Eq. (3d ed.) § 1521 *a*. *Stafford* v. *Richardson*, 15 Wend. 302. *Little* v. *Blunt*, 9 Pick. 488. *Brandram* v. *Wharton*, 1 Barn. & Ald. 463.

B. R. Curtis, for the plaintiffs. The main question is, whether creditors of a bank can make any direct claim on the stockholders to restore lost capital. It was *decided* in *Harris* v. *First Parish in Dorchester*, 23 Pick. 112, that such claim cannot be enforced, in an action at law, by a single creditor, and it was *said* that it might be enforced by a bill in equity, brought for all the creditors. The capital stock of a bank is a trust fund for the payment of the debts of the bank. Per Story, J. 3 Mason, 311. So it is regarded in Rev. Sts. *c.* 44, §§ 8 – 10. And this consideration is as applicable to § 30 as to § 31 of Rev. Sts. *c.* 36. Under the circumstances of this case, the receivers should have seen that the lost fund was replaced. The liability of the stockholders for the lost capital is a debt to the bank, which the receivers should collect for the benefit of the creditors. Rev. Sts. *c.* 36, §§ 8 – 10. *Gray* v. *Bennett*, 3 Met. 522. Section 22 of the same chapter authorizes the receivers, as representatives of the creditors, to bring a bill in equity against the stockholders, without joining the creditors as plaintiffs. See *Holland* v. *Cruft*, 20 Pick. 321. When trustees, who have a right to sue, refuse to sue, the *cestuis que trust* may sue, joining the trustees.

Though there was no remedy in equity, in a case like this when the act incorporating the State Bank was passed, yet it

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does not follow that no such remedy exists now. Giving a remedy sometimes gives a right; as giving equity powers where there was previously no legal right. The rights of creditors, as to the funds of a bank, were the same in 1811 as in 1836, when the Rev. Sts. came into operation. The remedies are different. Granting that a mandamus was the only remedy in 1811, yet the creditors' rights were the same as they now are in equity; viz. to have the fund applied to pay their demands. In the present state of the laws, a mandamus would not be granted; there now being other remedies. See *Harrington* v. *County Commissioners*, 22 Pick. 268. *King William Justices* v. *Munday*, 2 Leigh, 165. Angell & Ames on Corp. (2d ed.) 576, 577. Bac. Ab. Mandamus, C. 2. A mandamus to a corporation to sue stockholders would be nugatory, if the corporation should not wish to recover; and a mandamus, that the corporation should recover, would be preposterous.

2. If an action at law, brought by the corporation against the stockholders, to recover the lost capital, would not be barred by the statute of limitations, then this bill is not barred. Under *St.* 1786, *c.* 52, § 1, which is a transcript of *St.* 21 Jac. 1, *c.* 16, § 3, such an action would not be barred. *Jones* v. *Pope*, 1 Saund. 37. *Hodsden* v. *Harridge*, 2 Saund. 64. *Pease* v. *Howard*, 14 Johns. 479. *Bullard* v. *Bell*, 1 Mason, 243. And the Rev. Sts. *c.* 120, § 1, though somewhat different in phraseology from *St.* 1786, were "not intended to make any change," as the commissioners expressly declare in a note.

The proof, made before the receivers, of the plaintiffs' claims on the bank, is binding on the stockholders. *Slee* v. *Bloom*, 20 Johns. 669. Those claims have been turned into *specialties*, which are not within *St.* 1786, *c.* 52, nor the Rev. Sts. *c.* 120, if there has been "no change" in the law. The plaintiffs sue as creditors of the bank; and as a bank cannot set up the statute as a bar to an action brought upon any evidences of debt issued by it, (Rev. Sts. *c.* 120, § 4,) the stockholders cannot set it up so as to bar the plaintiffs.

The statute began to run when the plaintiffs' right to the

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relief prayed for accrued. But the *plaintiffs* had no right to such relief until the receivers refused to take measures to replace the lost capital. The creditors rightfully waited a reasonable time for the receivers to do their duty, without demanding of them that they should proceed. Their right to bring a bill in equity does not accrue when a loss of capital happens, but when they learn that the capital is insufficient to pay them. See *Wood* v. *Dummer*, 3 Mason, 319, 320. The nominal assets of a bank are always sufficient to pay its creditors; and until it is ascertained whether they are available, or not, it cannot be known whether there will, or will not, be an ultimate loss to the creditors.

Greenleaf, in reply. There is no remedy in this case, by any proceeding in the names of the creditors of the bank. The capital fund actually paid in is a trust fund; the bank is trustee, and the Commonwealth, primarily, is *cestui que trust*. In a modified way, and to a limited extent, creditors of the bank are *cestuis que trust*; i. e. when the fund is deficient Generally, they have no right to an account. The case is analogous to a public charity, where the attorney general proceeds by bill, for the sovereign power. The duty of preserving the fund is on the corporation, and the right of restoring it belongs to the corporation alone. The stockholders are not trustees; they have received nothing, have done nothing wrong, and have omitted nothing which they ought to have done. The plaintiffs, however, assert that the stockholders' liability is a debt, which the receivers might collect. But in the Rev. Sts. *c.* 44, § 8, the "debts," which receivers may collect, mean debts by contract, in the popular sense. In *Gray* v. *Bennett*, 3 Met. 522, the defendant had received money. And that a liability is not a debt, was decided in *Kelton* v. *Phillips*, 3 Met. 61. The case of *Holland* v. *Cruft*, 20 Pick. 321, furnishes no precedent for the plaintiffs; for the action was brought by the trustee. The remedy is confined to the corporation, or its receivers. See *Law* v. *Rigby*, 4 Bro. C. C. 60. *Houlditch* v. *Marquis of Donegall*, 1 Sim. & Stu. 494. Story Eq. Pl. § 740

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Perhaps the former statute of limitations (*St.* 1786, *c.* 52,) might not have barred this bill, if it could ever have been maintained. The decisions on like statutes, which have been cited for the plaintiffs, from Saunders and 1 Mason, need not be impugned; for the Rev. Sts. have changed the law on this point. The intention of the commissioners is of no importance. The intention of the legislature, as ascertained from intelligible terms used in the statute, and taken in their ordinary sense, is to decide this point. *U. States* v. *Fisher*, 2 Cranch, 390.

Statutes of limitations run from the time of the wrongful act done, or from the time of damage sustained from a lawful act. *Roberts* v. *Read*, 16 East, 215. *Wordsworth* v. *Harley*, 1 Barn. & Adolph. 391. *Gillon* v. *Boddington*, 1 Car. & P. 541, and Ry. & Mood. 161. *Sutton* v. *Clarke*, 6 Taunt. 29. *Lloyd* v. *Wigney*, 6 Bing. 489. *Smith* v. *Shaw*, 10 Barn. & Cres. 277. *Heard* v. *Middlesex Canal*, 5 Met. 81.

Wilde, J.* This is a case of great importance to the parties and to the public, as the principles upon which it is to be decided, relating to the duties and liabilities of our banking corporations and corporators, must be interesting to a great portion of the community. The parties also are very numerous, and whatever may be the decision of the case, many persons, without any fault on their part, must be subjected to losses. We have, therefore, considered the case with great deliberation, and I will now, as briefly as may be, state the opinion of the court, and the principles upon which it is founded.

The first question discussed by counsel depends upon the construction of the 30th section of the 36th chapter of the revised statutes, on which the bill is founded. That section provides, that "if any loss or deficiency of the capital stock in any bank shall arise from the official mismanagement of the directors, the stockholders at the time of such misman agement shall, in their individual capacities, be liable to pay

* *Hubbard*, J. did not sit in this case.

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the same; provided, that no stockholder shall be liable to pay a sum exceeding the amount of the stock actually held by such stockholder at that time." The plaintiffs' counsel contend that the construction of this section was settled by the decision in the case of *Harris* v. *First Parish in Dorchester*, 23 Pick. 112. But we do not so consider that decision. All that was decided in that case was, that the holder of a post note of an insolvent bank could not, by virtue of the said 30th section, maintain an action at law against a stockholder; and that his remedy, if he had any, was by a bill in equity in behalf of all the creditors of the bank.

All the present members of the court, who decided that case, feel entire confidence that nothing more was intended to be decided, than that that action could not be maintained; and that we did not intend to give any construction to the section in question, except so far as it related to an action at law. Otherwise, we should not have failed, I think, to have considered, and to have attempted to obviate, the objections to the construction contended for by the plaintiffs' counsel, which now appear to us to have great weight, and which could not have been overlooked, if the question had been deliberately considered. The learned judge, who drew up the opinion in that case, might have had, and probably had, a different impression, when he reduced the opinion to writing; but we certainly did not intend to decide upon the equitable rights of a party, in a case in which his legal rights alone were involved. And if we had expressed an opinion upon a question not involved in the issue between the parties, it would have been an extrajudicial opinion, and must be considered as fully open for reconsideration and revision. We consider, therefore, the question of the construction of § 30 of *c.* 36, as an open question, now to be considered and determined. The question is, whether by this section the creditors of a bank can maintain a suit in equity against the stockholders, to recover payment of their demands against the bank.

The plaintiffs' counsel contend, that the capital stock of a bank is a fund held in trust by the corporation, for the benefit

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and security of its creditors; and that when the fund is lost, or so reduced by the mismanagement of the directors, as not to be sufficient to pay its debts, and the stockholders shall refuse to make good the loss or deficiency, and the corporation shall refuse to cause a suit to be instituted against them, to compel such restitution of the capital stock, then the creditors of the bank may maintain a suit in equity against the stockholders, to enforce the payment of their demands to the full amount of the capital stock. On the other hand, the defendants' counsel insist, that the creditors can maintain no suit at law or in equity against the stockholders on the 30th section; that that section was intended to enable the corporation to keep good their capital stock, and to enable them to compel the stockholders to contribute proportionally, to make good any deficiency arising from the mismanagement of the directors, if any of the stockholders should refuse to pay their due proportion of the same; that payment was to be made to the corporation, and not to the creditors; that the object of the section was to prevent the insolvency of the bank, and not to provide a remedy in case of insolvency; and that in such a case there was no remedy for creditors, except by the 31st section, which, however, is expressly limited to bill holders.

The language of § 30 is certainly not very clear and explicit; but considering it in connexion with § 31, and other sections of the 36th chapter, its meaning, we think, may be ascertained with reasonable certainty. The 30th section, in terms certainly, does not create any liability in favor of creditors. The stockholders are made liable to pay any loss or deficiency of the capital stock; and the payment, unquestionably, was intended to be made to the bank; and the present bill is framed upon the admission that such is the true construction of this section. The creditors can have no claim on the stockholders, until after the total loss of the capital stock, and the insolvency of the bank. While the assets of the bank are sufficient to pay its debts, or if not sufficient, and the insufficiency is unknown, and the bank continues to

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pay its debts and bills when demanded, the creditors have no claim on the stockholders. The question then is, whether they have any remedy by virtue of the 30th section, to enforce the payment of their claims against the stockholders, after the known failure or insolvency of the bank. If they had any such remedy, they would be held to prove that they were creditors at the time of the total loss of the capital stock; which it would be impracticable, probably, for the bill holders to prove. But however this may be, the bill holders, after the charter of the bank was annulled, had no remedy under § 30; a more full and beneficial remedy being provided by § 31, which creates a liability of the stockholders to pay all the outstanding bills, although they should exceed in amount the whole of the capital stock. To suppose that a double remedy was intended to coëxist, if not an absurdity, is a reproach upon the good sense and discernment of the legislature, and of the wise men who drew up those two sections.

The remaining question on this head of the defence is, whether this suit can be maintained by the plaintiffs and the creditors of the bank, other than the bill holders. The argument of the plaintiffs' counsel is, that the capital stock of the bank is a trust fund for the payment of the debts of the bank, and may be followed by the creditors into the hands of the stockholders. This is unquestionably a sound and well settled principle of equity. The case of *Wood* v. *Dummer*, 3 Mason, 308, was decided on that principle. But in that case it was proved that the stockholders had divided among themselves 75 per cent. of the capital stock, while a large amount of bills of the bank remained outstanding and unpaid. In that case the individual stockholders were not liable, in their private capacities, for the debts of the bank, and the principle of the decision was, that a trust fund may be always followed by the *cestui que trust*, into the hands of any persons having notice of the trust attached to it. But this principle affords us no aid in ascertaining the true meaning of the provision under consideration. The defendants have received no part

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of the trust fund, which has been wholly lost by the fraudulent mismanagement of some of the directors; and we cannot think that the 30th section was ever intended to apply to such a case. The object of that section seems to us to be, as its language indicates, to keep the capital stock good, to enable the bank to continue to carry on a safe business; and not for the purpose of paying the debts of an insolvent bank, whose charter has been annulled. And we are strongly confirmed in this opinion by the 31st section. If it was the intention of the legislature that the stockholders should be liable to pay all the debts of the bank, why should it not have been so expressed? The restrictive limitation to bank bills cannot be imputed to mistake or carelessness. The distinction between the bill holders and other creditors who deal directly with the bank is obvious; and that the legislature intended to give a preference to the former cannot well be doubted.

This 31st section seems equivalent to an express declaration, that whenever the charter of a bank shall expire by its own limitation, or shall be annulled by the legislature, as provided for in c. 36, the stockholders shall be only liable, in their individual capacities, to pay the outstanding bills of the bank. This, and the other considerations suggested, have brought us to the conclusion, which seems to us satisfactory, that the 30th section was never intended to provide a remedy for the creditors of a bank, to enforce the payment of their claims against the stockholders; but merely for the purpose of preventing any deficiency in the capital stock, while the business of the bank should be going on, and its credit should remain unimpaired. The capital stock of a bank, in the first instance, was required as the fund for the payment of its debts, upon the security of which it was authorized to discount, and to circulate its notes; and for this purpose it was required to be kept good and entire. The 30th section imposes this duty on the corporation and the stockholders; not for the purpose of paying existing debts, but for that of enabling them to continue to carry on the business of the bank with safety to the public. If they should refuse or neglect

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to comply with the requisition of the statute, the legislature, who had the guardianship of the public interest and safety, reserved to themselves, by the 40th section, the power to declare the charter forfeited. By that section the legislature had the right, from time to time, to appoint a committee to examine into the doings of any bank chartered under the authority of this Commonwealth; and if, upon such an examination, it should appear, and, after a hearing of said bank thereon, it should be determined by the legislature, that said bank had exceeded its powers, or had failed to comply with any of the rules, restrictions and conditions provided by law, its charter might be declared forfeited. By *St.* 1838, *c.* 14, § 5, bank commissioners were appointed, with further powers, for the purpose of enabling the legislature more effectually to apply the powers, reserved by the said 40th section, to all cases; whereby it was provided that if a majority of the commissioners should be of opinion, upon the examination of any bank, that the same was insolvent, or that its condition was such as to render its further progress hazardous to the public, they might apply to some one of the justices of this court to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business, as might be needful; which injunction said justice was authorized to grant, and, at his discretion, might appoint agents or receivers to take possession of the property and effects of the bank, subject to such rules and orders, as might from time to time be prescribed by this court, or any justice thereof, in vacation. This was an important provision, in all cases where the insolvency of a bank should first be discovered when the legislature was not in session, to prevent the misapplication of the assets until the legislature could exercise the power reserved by the Rev. Sts. *c.* 36, § 40. These are the provisions, and the only provisions, for a remedy in cases where a bank or its stockholders shall refuse or neglect to make good any deficiency of the capital stock caused by the mismanagement of the directors. By such neglect or refusal, a bank was liable to a forfeiture of its charter; and the

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stockholders thereupon were liable, by the 31st section, in their individual capacities, for the payment and redemption of all bills remaining unpaid, after winding up the concerns of the corporation. But, in such a case, it cannot be supposed that the capital stock was intended to be restored for the benefit of creditors. If the legislature had intended that the creditors, other than the bill holders, should have any claim on the stockholders for the payment of their demands, unquestionably it would have been so expressed in the 31st section.

Upon these considerations, without adverting to other objections to the plaintiffs' claim, which have been raised by the defendants' counsel, we are of opinion, that § 30 was never intended to apply to the stockholders of an insolvent bank; and that, in all such cases, after the charter of a bank has been declared forfeited, in pursuance of § 40, the stockholders are only liable, in their individual capacities, for the payment of the outstanding bills of the bank, under § 31. This construction of § 30, which we deem correct, is decisive against the plaintiffs' claim.

We have, nevertheless, considered another ground of defence, on which the defendants' counsel rely. They insist that if the plaintiffs ever had any valid claim upon the defendants, it has been barred by the statute of limitations. That this statute is obligatory upon courts of equity, as well as upon courts of law, is a principle established by numerous decisions, and cannot now be questioned. It was very fully considered by Lord Redesdale, in *Hovenden* v. *Lord Annesley*, 2 Scho. & Lef. 629. "But it is said," he remarked, "that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake, in point of language, to say that courts of equity act merely by *analogy* to the statutes; they act in *obedience* to them. Equity, which in all cases follows the law, acts on legal titles and legal demands according to matters of con-

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science which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law." The same general principle is laid down in 2 Story on Eq. § 1520, and is fully supported by the authorities. And we do not understand that the plaintiffs' counsel question the principle, that the statute of limitations is a bar in this suit, if it would be a bar in an action at law. But they contend that by the true construction of our statute of limitations, their demand is not barred, on the ground that an action founded on a liability created by statute is not within the statute; and they rely on the decision in the case of *Bullard* v. *Bell*, 1 Mason, 243, in which it was so decided in reference to the statute of limitations of the State of New Hampshire, which bars all actions of debt, grounded upon any lending or contract without specialty, unless commenced within six years next after the cause of action accrued. And it was decided that a statute was a specialty, within the meaning of the statute of limitations. But the language of our statute of limitations (Rev. Sts. *c.* 120,) varies materially from that of the statute of the State of New Hampshire. By the first section of our statute it is provided, that "all actions of debt, founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States; all actions of assumpsit, or upon the case, founded on any contract or liability, express or implied; shall be commenced within six years next after the cause of action shall accrue, and not afterwards."

That this case, as stated in the bill and answer, is within the express words of the statute of limitations, cannot be controverted. The defendants are charged with a debt created by statute; and this certainly is not founded upon a contract or liability under seal; nor upon any judgment or decree of a court of record. But it is argued for the plaintiffs, that the case, if within the letter, is not within the meaning of the statute. The argument is founded on a note of the revising

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commissioners, appended to the 120th chapter, in which it is stated, that "the enumeration and description of actions in this [first] section are more full and particular than those in *St.* 1786, *c.* 52; but it is not intended to make any change in the existing law. The language is taken chiefly from the revised code of New York, and is designed to adopt the law, as it is now understood, and to render it clear and explicit."

It is difficult, perhaps, to give a satisfactory explanation of this note. For, whatever might have been the intention of the learned commissioners, they certainly have made a change in the existing law. The *St.* of 1786, *c.* 52, § 1, extended to "all actions of debt grounded upon any lending or contract, without specialty." It would seem, however, that the commissioner, who penned this note, had not in his recollection the change of language in this clause of the first section; or, which is more probable, that he did not construe the former statute as a similar statute was construed in *Bullard* v. *Bell*; and that the word "specialty," and the words "contract under seal," were considered as convertible terms, as they certainly are according to the ordinary meaning of the word "specialty." But however this may be, the question is not what were the intention and meaning of the commissioners, as to the provision in question, but what was the intention of the legislature; and this must be determined by the language of the statute. And where the words are clear and explicit, they are to be understood in their natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the statute, by reason of some other clause, from which a different intention of the legislature might be inferred. Parker, 233. Bac. Ab. Statute, I. 2. Here the words "contracts under seal" and "liability" are plain words, the meaning of which is too obvious and clear to be misunderstood; and if the legislature intended to except from the operation of the statute liabilities created by statute, it must be presumed that it would have been so expressed.

It was then argued by the plaintiffs' counsel, that the statute did not begin to run until the plaintiffs' right to sue in

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equity accrued, which was not before the receivers of the bank refused to commence an action for their benefit. But if this argument would hold good, the plaintiffs might delay their application to the directors of the bank, or the receivers, for any length of time, and the statute would be inoperative and nugatory. It has also been argued that the statute did not begin to run until it was first ascertained what would be paid by the assets of the bank. But we think that suits might be commenced against the bank and against the stockholders at the same time, and that the suits might go on *pari passu*. But there is another and a conclusive answer to both of these arguments. The demand sought to be enforced in this suit was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock, an action accrued to the bank, according to the construction of the 30th section, which is contended for by the plaintiffs' counsel, to recover a sum from the stockholders, respectively, equal to each one's share of the stock. The statute, therefore, began to run, in strictness, immediately on the loss of the capital stock, and certainly when the bank stopped payment; and after the lapse of six years from that time the debt was barred, and as effectually as though it had been actually paid. So also if, after the insolvency of the bank, the stockholders became directly liable to the creditors, the plaintiffs' right of action accrued immediately upon the loss of the whole capital stock, and the statute of limitations is a bar to the plaintiffs' demand in any form of action.

The conclusion then is, that if, contrary to what we consider the true meaning of § 30, the plaintiffs ever had any equitable claims upon the defendants, they are barred by the statute of limitations; so that on both grounds, on which the defendants rely, they are entitled to judgment for the dismissal of this bill, with costs.

Bill dismissed.

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The Boston Water Power Company *vs.* City of Boston.

The Boston Water Power Company are not taxable for their income, which is annually divided among the individual stockholders.

The Boston Water Power Company were taxed, on separate valuations, for their mill, and for land owned by them in fee, which was used solely for the flowing of water from their mill. *Held*, that if the mill and land might have been valued and assessed together, as one estate, and if the taxes, as assessed, were too large, yet that they were not void, and therefore, if paid, could not be recovered back by action; but that the remedy was by application to the proper authority for an abatement.

Assumpsit for money had and received. The suit was brought to recover back taxes assessed upon the plaintiffs' real and personal estate, and paid by them to the defendants, in the four years next before the commencement of the action; viz. $91·70, assessed in said years on personal estate, and $628·50 assessed on real estate. The parties agreed that such judgment should be entered, as the court might direct, upon the following agreed statement of facts:

The plaintiffs are a corporation established by *St.* 1824, *c.* 26. In the years 1839, 1840, 1841 and 1842, the sum of $91·70, in the whole, was assessed, by the assessors of Boston, on the income of the plaintiffs; they having no other personal property. Said income consisted of the profits of a grist mill namely, the usual toll, payable in kind, on grain ground at their mill, situate in Boston, and of the rents of water power and real estate demised to divers lessees. The income of the plaintiffs, after paying their expenses, was divided annually among the individual stockholders.

In the same years, $628·50, in the whole, was assessed, as aforesaid, upon real estate of the plaintiffs. By virtue of their act of incorporation, the plaintiffs are proprietors of a large water power created by the dams erected by the Boston and Roxbury Mill Corporation, (established by *St.* 1814, *c.* 39,) flowing from the full basin, so called, into the receiving or empty basin, so called; a large part of said receiving basin, and a very small part of said full basin, being situate within the limits of the city of Boston, and all the residue within the

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limits of the towns of Brookline and Roxbury, in the county of Norfolk. The plaintiffs are also proprietors of, and carry on, a grist mill, situate in Boston, and worked by the water power aforesaid, which was valued and taxed by the city assessors, for the four years aforesaid, upon a distinct valuation; and said last mentioned tax has been paid by the plaintiffs without objection.

Other and extensive mills, owned by lessees of the water power, are situate, one in Boston, and the others in Roxbury, and use a great part of the water power belonging to the plaintiffs; and the proprietors of these mills are taxed therefor, respectively, in Boston and Roxbury.

The plaintiffs, by virtue of the act incorporating the Boston and Roxbury Mill Corporation, and their own act of incorporation, and of certain indentures of compromise, made with the city of Boston and other owners of lands, have become proprietors of the fee of certain land situate within the limits of Boston, on the eastern side of the said receiving basin, and within the line thereof which is flowed. The taxes on the real estate of the plaintiffs, which are in dispute in this action, were assessed upon the land last mentioned, upon distinct valuations, separate from said grist mill and mill power. In 1839, the plaintiffs were assessed for "their works," houses occupied by different persons, and "land in Ward 11;" in 1840, for "the works over the dam," houses, &c. and "Ward 11 land;" in 1841, for "mills," houses, and "Ward 11 lot;" and in 1842, for "grain mills," houses, and "Ward 11 lots." This land or lot in Ward 11, was the land above mentioned, lying in Boston, on the eastern side of said receiving basin; is used solely for the purpose of the flowing of water from the wheels of said grist mill, and the other mills above mentioned; and is covered with water a large portion of the time. Said land has never been laid out into lots.

The sums sued for, paid in the years 1839, 1840 and 1841, were paid by the plaintiffs, with a denial of the right of the defendants to tax said land or said personal property, but without a formal protest. The sum paid in the year 1842

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was paid after a summons was issued by the treasurer of the city, and under a formal written protest, which was filed, at the same time, with the treasurer; and repayment of said last named sum, and of all the amounts in suit, was demanded of said treasurer, at the same time.

Gardiner & Pope, for the plaintiffs. The plaintiffs' land cannot be taxed separately from the mills, as it is all appurtenant to the mills. *Hayden* v. *Foster*, 13 Pick. 497. *Miller* v. *Miller*, 13 Pick. 239. *Boston Manuf. Co.* v. *Inhabitants of Newton*, 22 Pick. 22. By their charter, (*St.* 1824, *c.* 26, § 1,) the plaintiffs were authorized to "hold any quantity of the water power created by the establishment of the dams between Boston and Roxbury, or any lands contiguous to said dams, or within the limits of the basins connected therewith, or either of them," and also "to make flumes, canals, and race-ways, and to construct mill wheels, factories," &c. Their land in the receiving basin is of no value except for flowing; and as their right of flowing it is a franchise, and the land is appropriated, by their charter, to public uses, it is exempted from taxation in the form adopted by the assessors of the city. *Inhabitants of Worcester* v. *Western Rail Road*, 4 Met. 564. *Boston Water Power Co.* v. *Boston and Worcester Rail Road*, 16 Pick. 526, and 23 Pick. 391. *Boston and Roxbury Mill Corp.* v. *Newman*, 12 Pick. 477. *Boston and Roxbury Mill Corp.* v. *Gardner*, 2 Pick. 33.

All personal estate must be assessed to the owner, in the town where he is an inhabitant. Rev. Sts. *c.* 7, § 9. A corporation is not an inhabitant of any town. Besides; the plaintiffs had no personal property, yet they were taxed for income, under the name of such property. But corporations are not taxable for income, nor for personal property. The shares of the stockholders are alone taxable. See Rev. Sts. *c.* 7, § 4. *Salem Iron Factory Co.* v. *Inhabitants of Danvers*, 10 Mass. 514. *Amesbury Woolen and Cotton Manuf. Co.* v. *Inhabitants of Amesbury*, 17 Mass. 461. *Boston and Sandwich Glass Co.* v. *City of Boston*, 4 Met. 181. *Gardiner Cotton and Woolen Factory Co.* v. *Inhabitants of Gardiner*, 5 Greenl. 133.

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These were cases of manufacturing corporations; but they were not decided on considerations specially applicable to them, but on the ground that they were bodies corporate. Some of these cases were decided before the statutes respecting manufacturing corporations were enacted.

J. Pickering, (City Solicitor,) for the defendants. The tolls and rents received by the plaintiffs were income, and taxable, as such, if at all. Rev. Sts. *c.* 7, § 4. By *St.* 1840, *c.* 78, § 1, grist mills are to be returned by assessors as taxable property; and if anything belonging to such mills can be regarded as personalty, it may be taxed as such. Toll is not taxable as real estate, or as incident to the realty. It is not the profits of real estate, but of the operations carried on upon the realty.

The plaintiffs' *works* or *mills* were assessed, their houses, and their *land* or *lots* in Ward 11. If the latter were not properly taxed, separately from the works or mills, such separate taxation was an over-valuation, for which the plaintiffs' only remedy was by application for an abatement.

Most of the cases cited for the plaintiffs are applicable to manufacturing corporations, *eo nomine*, and do not govern the present case. In 4 Met. 564, the line of the rail road track, without which the purposes of the corporation would not be carried into effect, was held not to be taxable. Thus far there was a public easement, and an appropriation to public uses. But a right granted to a corporation to flow land, for the purpose of obtaining a mill power, is not an appropriation of the land to public use.

Shaw, C. J. The court are of opinion that the plaintiffs are not liable to be taxed for personal estate or income. The whole value of their personal estate is included in the value of the shares of the stock, and, as such, is liable to be taxed to the holders of the shares *eo nomine*. By the Rev. Sts. *c.* 7, § 4, "personal estate shall, for the purposes of taxation, be construed to include stocks in turnpikes, bridges and all monied corporations." By § 9, all personal estate, not excepted in § 10, "shall be assessed to the owner in the town

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where he shall be an inhabitant on the first day of May." By § 10, "all goods, wares and merchandize, or any other stock in trade, including stock in the business of any of the mechanic arts, in towns within the State, other than where the owners reside, shall be taxed in those towns, if the owners hire or occupy stores, shops or wharves therein, and shall not be taxable where the owners reside. All machinery, employed in any branch of manufactures, and belonging to any corporation, shall be assessed to such corporation, in the town or other place where such machinery may be situated or employed; and in assessing the stockholders, for their shares in any manufacturing corporation, there shall first be deducted from the value thereof, the value of the machinery and real estate belonging to such corporation." Here the exception proves the rule. It shows that the general value of the shares shall be taxed to the owners, and not to the corporation.

If this personal property was "stock in trade," or "machinery employed in any branch of manufactures," it should have been so stated; but being taxed generally, as "personal property," we are not so to understand. Indeed, the case finds that the plaintiffs have no personal property, and that the tax was imposed in respect to income.

If it be said that the plaintiffs are not a manufacturing corporation, then there is no statute provision that subjects any of their personal property to taxation, and the respective owners are taxable for the whole value of the personal property; and of course the corporation is not taxable.

But the real estate stands upon a different footing; being taxable where it is situated, whoever is the owner; and therefore is taxable to the corporation. Indeed, the corporation was taxed, every year, for a considerable amount of real estate; and of this no complaint is made. But it is insisted that, as that part of the plaintiffs' estate is described as lying in Ward 11, and, in some of the assessments, is described as "lots," it is wrongly taxed as a separate estate, because it was annexed o, or occupied with, the mill, as an entire and inseparable estate The first answer is, that it was assessed in that mode.

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several years, without any objection on the part of the proprietors; from which their acquiescence may be inferred. Again; it is understood that they hold the land so taxed by a distinct tenure. Having authority, by their charter, to take and hold real estate, they have obtained a grant in fee of this parcel of real estate; whereas, in that part granted to them, by their charter, out of the public domain, they have a perpetual easement for the use of their mills. But, thirdly, there is no provision of law, that a tax shall be void, when two or more parcels of real estate, belonging to the same owner, and in his own occupation, are assessed together when they might have been severed, or are assessed separately when they might have been united. In *Hayden* v. *Foster*, 13 Pick. 492, it was decided that the laws contemplated a separate assessment, when tenements and parcels of land, though belonging to the same owner, are in distinct occupations, or subject to distinct demises, mortgages, or other derivative rights; and in that case, they were, in fact, so separately assessed; each parcel was subject to a lien for its own tax, and not for the tax on other estates of the same owner. And we think, on revision, the reasons for such a distinction are quite conclusive.

But after all, the whole real estate in the same town or city, belonging to the same owner, constitutes, as between the town or city and the tax payer, but one substantive subject of taxation; and therefore, when the tax payer has cause of complaint, that the tax is too large, his only remedy is by appeal to the assessors for abatement, and, on their refusal, to the county commissioners, or to those who exercise the same functions. *Osborn* v. *Inhabitants of Danvers*, 6 Pick. 98. A distinction has been made, for obvious reasons, between real estate and personal property; and where one is not liable for any tax on personal property, it is held that a tax on his poll and personal property is not an over-taxation, but a wholly void tax, although he, as a non-resident, is taxed for real estate in the same town. *Preston* v. *City of Boston*, 12 Pick. 7.

It is argued that this property is wholly exempted from tax-

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ation, as property appropriated to public use. If it be true that public ways, namely, rail roads, turnpikes and bridges, are so exempted, and the incorporated proprietors are liable only for their shares, we think it does not apply to estates used for purposes not directly incident to the public accommodation contemplated. What was granted to the corporation was simply a right to use a portion of the public land covered with navigable water; but the avowed purpose was to erect mills, and employ or let them. We think there is no analogy between the cases, and that the objection cannot be allowed.

Considering the taxes on the personal and real estate as separate and distinct; that the tax on personal property was not an over-taxation, but a tax which the city had no authority to assess; and that the payment was under notice and claim of exemption; the court are of opinion that the plaintiffs are entitled to judgment for the amount thereof, with interest from the time of demand; 4 Met. 181; but that, in respect to the real estate, their only remedy was an appeal in the manner prescribed by the Rev. Sts. *c.* 7, §§ 37–41.

JOHN LISCOM & another *vs.* THE BOSTON MUTUAL FIRE INSURANCE COMPANY.

A fire insurance company executed a policy insuring a three story brick building, called the Central Exchange, which was afterwards burned: A by-law of the company, attached to the policy when it issued, was in these words: "All policies, which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues:" On the policy when it issued, was this memorandum: "Five thousand dollars insured by the Worcester Mutual Fire Insurance Company:" The prior insurance was, in fact, $4700 on the three story brick building and a two story wooden building connected therewith, which were called the Central Exchange, and $300 on a barn near the same: *Held*, in a suit on the second policy, that though a compliance with the said by-law was a condition precedent to the validity of the policy, yet that the said memorandum of the prior insurance was a sufficient compliance with the by-law, and that the defendants were liable on their policy.

The law of marine insurance respecting salvage does not apply to a fire policy issued by a mutual fire insurance company: On such a policy, the assured is entitled to recover the amount of his insurance, when the insured building is destroyed, without deducting the value of the materials which remain.

ASSUMPSIT on a policy of insurance dated November 22d 1839, whereby the defendants caused the plaintiffs to be

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insured against loss by fire, under the conditions and limitations expressed in the defendants' by-laws, for the sum of $4000, on the three story brick building situated in Worcester, and known as the Central Exchange. The plaintiffs averred, in their first count, that before the execution of said policy the said building was insured by the Worcester Mutual Fire Insurance Company, for the sum of $5000, and that this was known to the defendants, and was expressed in the said policy at the time it issued. The second and third counts were like the first, except that the previous insurance on said building, by the Worcester Mutual Insurance Company, was averred, in the second count, to be $4200, and in the third, to be $4700. The plaintiffs claimed $4000, the whole amount of the policy, with interest after thirty days from notice given of the loss. The defendants filed a specification of their defence, as follows: "*First.* The three story brick building, known as the Central Exchange, and mentioned in the plaintiffs' declaration, had been previously insured, and was insured at the time the policy declared on issued, to wit, at the Worcester Mutual Fire Insurance Company, bearing date the 1st of February 1839, for seven years, which was not known to the defendants, or truly expressed in the policy issued by them, at the time it issued; and the said policy is therefore void by the 16th article of the by-laws of the defendants, which are annexed to said policy, and make a part of the contract declared on, by which 'all policies, which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues.' *Secondly.* That the premises alleged to be insured by the defendants, for the plaintiffs, were not insured at the Worcester office for $5000, as alleged by the plaintiffs. *Thirdly.* That the premises alleged to be insured at the Worcester office, were not insured by the defendants."

The trial was before *Wilde*, J. whose report thereof was as follows: The plaintiffs produced the policy declared on, and this memorandum was on the margin thereof: "Five thousand dollars insured by the Worcester Mutual Fire Insurance

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Company." The defendants' by-laws were also attached to the policy, the 16th article of which was as set forth in the specification of defence. The plaintiffs also produced a policy procured at the Worcester office by one of them, as trustee, dated February 1st 1839, in which the property insured was described as follows: "On the Central Exchange in Worcester $4700, and on the barn near the same $300."

It was admitted that the policy in suit covered only the front part of the building, which was three stories high and made of brick, and not that part of the building which was only two stories high and made of wood; and that the whole building was burnt.

The defendants contended that the Worcester policy covered the whole, as well that made of wood as that made of brick; and they moved for a nonsuit, on the ground that it appeared by the plaintiffs' own showing, that the premises insured by the defendants had been previously insured, and that such previous insurance was not known to them, or had not been expressed, or not truly expressed, on the policy executed by the defendants at the time it issued, and that the premises insured at the different offices were different; only a part of those insured at the Worcester office being covered by the policy declared on; and that the latter policy was therefore void. This motion was overruled, and the question reserved for the decision of the whole court.

There was evidence tending to prove that the building might and ought to have been repaired, after the fire, or the old walls "been built to," instead of making new walls, and that thus the expense would have been less than the aggregate amount of the two policies, viz. nine thousand dollars. There was also evidence tending to prove that such a proceeding would not have been safe nor good policy.

The defendants were permitted to prove, and did prove, (the plaintiffs objecting to the evidence,) by the president of the Worcester Mutual Insurance Company, that the policy obtained at that office covered, and was intended to cover the whole building, that part which was three stories high and of

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brick, as well as that which was two stories high and of wood; that at the date of the Worcester policy, the whole was considered as one building and insured for $4700; that subsequently, there ceased to be any connexion between the wooden and brick part of the building; though the witness did not know, except by report, when such connexion ceased.

It was proved by N. Hammond, that he, at the request of the president of the defendant company, examined this building, before the taking of the risk by the defendants, and gave notice to a person on the premises, who, as he understood, was the plaintiffs' agent, that he should advise the president not to take the risk, unless all connexion should cease between the brick and wooden parts of the building, and not to take the wooden part at any rate; and that he did so advise the president.

A witness, called by the defendants, estimated the loss of the two-story building at $800; and a witness, called by the plaintiffs, estimated the same loss at $500. And there was evidence tending to prove that the materials of the building, which were not destroyed by the fire, were worth $500.

On the point of damages, the jury were instructed that the plaintiffs were to be indemnified for their loss, to such amount, not exceeding the sum insured, as the jury should consider them entitled to, under the evidence in the case; that if the jury should be of opinion that the plaintiffs ought not to have taken down the old walls, but to have built up against them, then they would return a verdict for a partial loss; but if they should come to the conclusion that those walls were unsafe, and unfit to make use of, then they would find for a total loss (there being no dispute as to the total destruction of the premises, excepting said walls), deducting one third of the value of the materials saved; that being the proportion of the whole value of the premises insured by the defendants; with interest from thirty days after notice of the loss.

The jury returned a verdict against the defendants for a total loss, deducting therefrom one third of what they found

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to be the value of the materials which remained, being $167, and interest as directed, making the amount $4091·73.

Verdict to be amended, or judgment rendered thereon, or to be set aside and judgment rendered for the defendants, or a new trial granted, as the case, in the opinion of the full court, shall require.

Washburn, for the defendants. Compliance with the 16th article of the defendants' by-laws was a condition precedent to the validity of the policy. The previous insurance was not truly stated, as to the amount. It was obtained by one of the plaintiffs only, and was not truly stated, as to that fact. *Jackson* v. *Massachusetts Mutual Fire Ins. Co.* 23 Pick. 418. If no statement of the former policy had been made, the latter policy would clearly have been void. Is a false statement better than none? See *Ewer* v. *Washington Ins. Co.* 16 Pick. 502. The premises insured by the defendants were not the premises insured at the Worcester office for $5000. If they had been, the defendants would be liable. See *Gray* v. *Blanchard*, 8 Pick. 284. *Worsley* v. *Wood*, 6 T. R. 710. *Carpenter* v. *Providence Washington Ins. Co.* 16 Pet. 496.

C. P. Curtis, for the plaintiffs. If there is any difference between the premises insured in the first and second policies, the statement of the insurance by the first indicated that *more* was already insured, than was in fact insured, and this was for the defendants' advantage.

The whole loss is to be paid on a fire policy; especially where, as in the mutual offices in this State, not more than three fourths of the value can lawfully be insured. Rev. Sts. c. 37, § 28. There is no allowance for salvage, and no abandonment. *Strong* v. *Manufacturers' Ins. Co.* 10 Pick. 40. 2 Phil Ins. (2d ed.) 229.

Hubbard, J. The principal question in the present case is, whether the defendants are discharged from their contract, by reason of a false description given to them of the prior policy procured by the plaintiffs at Worcester.

By the 16th article of the defendants' by-laws, it is provided that "all policies, which may issue from this company,

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to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues." The entry on the margin of the contract now in suit, which we consider of the like effect as if written in the body of the policy, is in these words; "five thousand dollars insured by the Worcester Mutual Insurance Company." And by the evidence it appears that the sum of $4700 was insured on the building, and $300 on a barn on the premises; and that the policy on the building included also a wooden end which was not covered by the defendants' policy.

It is contended that a compliance with the by-law above mentioned is a condition precedent to a recovery, in cases where it applies; and we incline to that opinion. By the terms of the by-law, the contract is void if the previous insurance is not expressed in the policy at the time it issues. This is not like a representation, on the effecting of a marine policy, which is not required to be made a part of the executed contract; but it is a condition upon which the contract rests, and consequently its insertion in the contract is necessary to give it validity. The great object of the provision is to guard against fraud by preventing insurances on property greatly above its value. The legislature were sensible of this exposure, on the part of insurers, to suffer by means of fraudulent losses, and they therefore prescribed, among other regulations for the government of Mutual Fire Insurance Companies, Rev. Sts. *c.* 37, § 28, that they might insure upon any building within the State, any amount not exceeding three fourths of the value thereof. The object of the by-law above recited is to give efficiency to this provision of the statute, by securing a timely notice of the existence of a previous insurance, if any, and thus to prevent the assuming of risks on the property, beyond three fourths of its value.

The defendants contend that the provision of this by-law has not been complied with, and that the present policy is therefore not binding on the defendants, by reason of the false description of the prior policy. This objection we have carefully considered. The by-law does not prescribe the terms of such notice, nor how much of the previous con-

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tract shall be inserted. A literal recital of the terms of the prior contract is not required, but such a notice of the nature and amount of the insurance, as will give the necessary information to the party from whom a subsequent insurance is sought.

In this case the plaintiffs named a larger sum than was actually underwritten on the main or brick building; but the defendants were not deceived by the representation, nor induced to assume a greater risk than they otherwise would have done. This is obvious from the fact of their not insuring more than three fourths of the value of the building, upon the estimate of the plaintiffs, acted upon by them after the building had been examined by their own agent, in reference to the taking of this risk.

If the insurance had been represented as less than the fact, the defendants might have been induced to underwrite a larger sum than they otherwise would have done, and thus might have been injured by the misstatement; but not so where it was overstated.

The notice expressed in the policy, we think, was a substantial compliance with the requirements of the 16th article of the defendants' by-laws and a sufficient exposition of the fact of the former insurance, so as to give the defendants all the information material to be known in relation to the risk which they were requested to assume.

A question was also raised by the plaintiffs in regard to the direction given to the jury as to the amount of the loss; and in this respect we think the direction was erroneous. The law of marine insurance respecting salvage does not apply to the fire policies of mutual insurance companies. They assume the risk of only a certain part of the property, not usually, if ever, exceeding two thirds or three fourths of its value. In the event of loss, therefore, the contract being one of indemnity, the party is entitled to recover to the amount of that loss, if less than the sum insured; and if there is a total destruction of the property, then to the amount of the policy.

According to the agreement of the parties, the verdict is to be amended, and judgment rendered for a total loss.

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John C. Greene & others *vs.* Nathaniel Goddard.

H., the agent, in Boston, of W. & Co., bankers in London, gave this letter of credit: "I hereby authorize R. & Co. to value on W. & Co. at six months' sight, at Canton, for the account of G. of Boston, for any sums not exceeding £6000 sterling; and I hereby engage, as the authorized agent of W. & Co., that the bills of R. & Co. shall be duly honored, when presented, if drawn within twelve months from the date of this letter:" G. at the same time engaged to remit to W. & Co., in London, funds sufficient to meet the payment of all bills drawn by virtue of the said letter of credit. G. transmitted this letter to R. & Co., at Canton, and requested them to draw bills, pursuant to said letter, to dispose of the bills, and to invest the proceeds in merchandize on G.'s account, and ship it to him in the United States: R. & Co. drew bills accordingly, on W. & Co., and with the proceeds thereof purchased merchandize and forwarded it to G., which he received and accepted: W. & Co. accepted the bills, but failed in business, before the bills fell due: F., one of the firm of R. & Co., resident in Boston, on hearing of the failure of W. & Co., made an arrangement with B & Co. of London, to take up these bills, at maturity, (and other like bills, to a much larger amount, drawn by R. & Co. on W. & Co., and by them accepted,) for the honor of R. & Co., the drawers; and B. & Co. accordingly took them up, supra protest. By this arrangement with B. & Co., F. was to send funds to them; and B. & Co. were to make advances for R. & Co. on merchandize by them before consigned to B. & Co. for sale, and were to hold the merchandize as security for such advances: F. remitted bills of exchange to B. & Co., which he purchased at a premium of twenty one per cent., which was then the rate of exchange between the United States and London, but was less than would have been the damages, if the bills drawn by R. & Co. had been returned to them at Canton: The bills thus purchased were remitted, at different times, to meet the bills drawn by R. & Co. on W. & Co., as they might fall due, and not especially for the payment of the bills drawn on G.'s account: G. did not remit funds to W. & Co. to meet the payment of these bills at maturity; but he afterwards sent funds to them, with which W. & Co. took up those bills, by paying to B. & Co. the amount thereof, with interest, bankers' commissions and notarial charges: R. & Co. afterwards brought an action against G. to recover damages sustained by them, *first*, in paying a premium on their remittances to B. & Co., and *secondly*, in the loss arising from their not being able to draw against the merchandize in the hands of B. & Co., which was held by them as security for their advances towards taking up bills for the plaintiffs' honor. *Held*, that G., by requesting R. & Co to draw said bills, undertook and was liable to indemnify them for so doing; that this liability was not extinguished or affected by G.'s furnishing funds to W. & Co., and by their payment to B. & Co. of the bills, with interest and charges; that R. & Co. had a legal right to protect their credit, by causing the bills to be paid supra protest for their honor, without waiting for a return of the bills to them at Canton; and that the loss, arising from the premium paid for remittances, should be assessed equally and ratably upon all the bills paid for R. & Co. by B. & Co.; but that G. was not liable to R. & Co. for any loss arising from their not being able to draw against their merchandize in the hands of B. & Co.

This was an action of assumpsit to recover damages for a breach of a contract alleged to have been made by the defendant with the plaintiffs, as implied by law, on the facts

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hereinafter stated. At the trial before *Hubbard*, J. the evidence introduced by the parties showed, in substance, the following facts:

On the 1st of March 1836, Messrs. T. Wiggin & Co., of the city of London in England, bankers, by their duly authorized agent, Robert Hooper, jr., at Boston, granted to the defendant a letter of credit, of which the following is a copy: "Boston, March 1, 1836. I hereby authorize Messrs. Russell & Co. to value on Messrs. T. Wiggin & Co., London, at six months' sight, at Canton, for the account of Nathaniel Goddard, Esq. of Boston, for any sums not exceeding in all four thousand pounds sterling. And I hereby engage, as the authorized agent of Messrs. T. Wiggin & Co., that the bills of Messrs. Russell & Co. shall be duly honored when presented, if drawn within twelve months from the date of this letter. Robt. Hooper, jr. Attorney to T. Wiggin & Co."

The defendant, at the same time, signed the contract with the said T. Wiggin & Co., of which the following is a copy. "Boston, March 1, 1836. Mr. Robert Hooper, jr., on behalf of Messrs. T. Wiggin & Co. of London, having at this date opened a credit on said T. Wiggin & Co. for my account, to be used in Canton by Russell & Co. to the extent of four thousand pounds sterling, in consideration thereof I hereby agree to remit to T. Wiggin & Co., in London, sufficient funds to meet the payment of all bills which may be drawn by virtue of this credit, together with all charges on the same. I further agree with said T. Wiggin & Co. to give security here, to the satisfaction of their agent, to the amount of four thousand pounds sterling, at any time when required by them or their agent. Nathaniel Goddard."

On the 18th of March 1836, the said T. Wiggin & Co., by their said agent, at Boston, granted to the defendant another letter of credit for two thousand pounds sterling; and the defendant, at the same time, signed a contract with the said T. Wiggin & Co. This second letter and second contract were like the first letter and first contract, above set forth, in all particulars except the sum therein mentioned.

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The plaintiffs, at the dates of these letters of credit, were commission merchants, having a house of trade at Canton, in China, one of the partners whereof then and always resided in the United States, for the purpose of attending to the business of the house, which consisted chiefly of commission business transacted in China for merchants in the United States.

On or about the date of the last of said letters of credit, the defendant sent both of said letters to the plaintiffs at Canton, requesting them to draw bills of exchange, pursuant to said letters, to dispose of the bills of exchange, and to invest the proceeds in merchandize for the defendant's account, and send it to him in the United States. The plaintiffs received these instructions, at Canton, and, pursuant thereto, they drew on T. Wiggin & Co., eight bills, each for £500 sterling, on the 16th of August 1836, one bill for £500 sterling, and another for £1500 sterling, on the 6th of October 1836. These bills were all payable in six months after sight, being the usual time on which bills, drawn in China on English bankers, are made payable; and they were sold by the plaintiffs in Canton, and went through India to England (as is the usual course of bills drawn in China,) and were presented to and accepted by the drawees, in London, between the 2d of March and the 22d of April, 1837. The plaintiffs, with the proceeds of these bills, purchased the merchandize (silks and teas) which the defendant had ordered, and sent it to him in the United States, together with the regular and usual accounts of their doings in the premises; and the defendant accepted and received the said merchandize to his own use.

On the 3d of June 1837, while all the said bills were running towards maturity, Wiggin & Co., the acceptors, failed and stopped payment. Notice of their failure reached Boston on the 27th of said June, and on that or the next day, this notice was received by J. M. Forbes, one of the plaintiffs, then residing in Boston. On the 29th of July 1837, Mr. Forbes, on behalf of his house, addressed the following letter to the defendant: "Nathaniel Goddard, Esq., sir: I learn that bills drawn by

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Russell & Co. of Canton, on Messrs. Timo. Wiggin & Co. London, for your account, become due as follows:

2 for £500 and 500	— 1000	on the	5th	September	next,
2 for 500 and 500	— 1000	"	28th	"	"
1 for 500	— 500	"	2d	October	"
1 for	— 1500	"	17th	"	"
4 for 500 each	— 2000	"	25th	"	"

in all for £6000, six thousand pounds sterling.

"Will you be so good as to inform me whether you have taken the necessary steps to meet these bills? And if not, what measures you are prepared to adopt in order to protect the drawers from the consequences of their non-payment at maturity? And oblige your obedient servant, J. M. Forbes, of the house of Russell & Co."

To this letter the defendant replied as follows:

"Boston, July 31st, 1837. J. M. Forbes, Esq. Sir: Your favor of the 29th current is before me, in which you state" [quoting the contents of Mr. Forbes's letter.] "In reply, I am happy to state that I have taken such measures as appear to me sufficient to prevent any bills, drawn for my account, from going back to the drawers. Nathaniel Goddard."

Mr. Forbes, in order to prevent the said bills, and other bills drawn by the plaintiffs, from going back to the drawers at Canton, purchased bills of exchange and sent them to Baring, Brothers & Co. The plaintiffs had, at the same time, a large credit with Baring, Brothers & Co., on account of merchandize which the plaintiffs had previously consigned to them; and they accordingly requested Baring, Brothers & Co. to make use of the proceeds of said bills, sent to them as aforesaid, and of said credit on account of said merchandize, to protect the bills drawn by the plaintiffs, by paying them at maturity, for the honor of the drawers. (See the facts, as to these bills and as to the credit on the plaintiffs' merchandize, more particularly stated in the opinion of the court, *post.* 230.)

The said Forbes was obliged to pay for the said bills, sent to Baring, Brothers & Co., as aforesaid, a premium of 21 per

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cent. on the par of exchange; that being the current rate of exchange between this country and England, at the time when said bills were purchased and remitted; and bills drawn by said Forbes, in behalf of his said house, on Baring, Brothers & Co. against the said credit on account of the said merchandize, might have been sold by him, at the same time, for the same premium.

All the bills drawn by the plaintiffs on account of the defendant, as aforesaid, were paid at maturity, supra protest, by Baring, Brothers & Co., for the honor of the drawers, under the arrangement made by the said Forbes, as aforesaid.

On the 19th of October 1837, Mr. Forbes, in behalf of his said house, addressed to the defendant the following letter: "Boston, 19th Oct. 1837. Nathaniel Goddard, Esq. Sir: I have to inform you that Messrs. Baring, Brothers & Co. have paid, for the honor of the drawers, two bills of exchange drawn by Russell & Co., Canton, 16th Aug. 1836, on your account, upon Messrs. Timo. Wiggin & Co.

£500 . . .	£1000 00 0
with notarial charges	4 14 0
postage	0 9 6
commission 1 per cent. . . .	10 0 0
	£1015 3 6
"Paid 6th September 1837, to meet the above amount with two months' interest at 5 per cent. per annum.	8 11 6
	£1023 15 0

"I paid, on or before the 6th of August, for a 60 day bill on London, remitted per packet of 8th of August, at a premium of 21 per cent., £5505·5·3, for which sum, with interest since the 6th of August, I will thank you to reimburse me at your earliest convenience. I remain, sir, respectfully,

"Your obedient serv't. J. M. Forbes, of R. & Co."

To this letter the defendant made a reply on the 23d of October 1837, which contained the following passages: "Yours of the 19th was duly received. I notice particularly its contents, and am very sorry it was not in my power

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promptly to take up the bills from Messrs. Russell & Co. of Canton. I attempted, and thought I should succeed in making an arrangement, to take up every bill that was used for my benefit; but I failed in this." "I must now say, I cannot be punctual, but will do every thing possible for me to do, to make payment in England, where I expect to, and am preparing to, meet the bills and discharge them as fast as possible. I am making and shall continue to make shipments of cotton, &c. for the purpose of meeting all my debts there. I hope, when I discharge all that Messrs. Baring, Brothers & Co. take up, with their commission, interest, and cost of protest, that all parties will be satisfied. I repeat, I cannot be punctual, but your debt is as safe ultimately, as if in gold in the bank. I will do every thing I can, even at a great sacrifice, to meet it as soon as possible. Yours very respectfully,

Nathaniel Goddard."

On the 7th of November 1837, Mr. Forbes, in behalf of his house, addressed a letter to the defendant, as follows: "Your favor of 23d October is received. In reply, I beg to assure you that it is far from my wish, or that of my partner now here, that you should sacrifice property unnecessarily to satisfy our claim, and that, placing full reliance upon your disposition to repay us promptly, we are content to await your convenience. We think, however, the principle on which our claim was made was a just one, viz. reimbursement for the amount actually paid on your account here. I trust that you will view the matter in the same light, and I shall be obliged to you by your giving me some acknowledgment of the debt payable here. In addition to the amount already advised, I have received protests of £1000 on your account paid 3d October, with charges, £15·6·6, which please note. Your obedient servant, J. M. Forbes."

To this letter the defendant replied thus: "Boston, November 8th, 1837. J. M. Forbes, Esq. Sir: I am happy to find you do not feel desirous that I should sacrifice property unnecessarily to meet bills drawn for my account." "As I before stated, I have been making arrangements to meet all

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bills made for my account in England, and shall do it as fast as possible, but cannot be punctual. I will do all I can. It was in England that these bills were intended to be paid. I have therefore, acted in conformity. You are ultimately perfectly safe, let the steps you take be what they may. Yours very respectfully, Nathaniel Goddard."

On the 21st of March 1838, Mr. Forbes, in behalf of his said house, addressed the following letter to the defendant: "Sir: My partner, Mr. Coolidge, is on the point of embarking for London, which I hope will prove my apology for asking of you some information as to your arrangements for paying the amount which we have taken up of bills on Messrs. Wiggin & Co. for your account; by giving which, you will oblige, sir, your obedient servant. J. M. Forbes, of the firm of Russell & Co."

The defendant's reply was thus: "Boston, 22d March, 1838. J. M. Forbes, Esq. Dear sir: I received your note of yesterday, inquiring what arrangements I have made for taking up the dishonored bills on Mr. Wiggin & Co. By particular request of Mr. Wiggin & Co., and in order, I suppose, to facilitate his resuming his usual business again, I have agreed to remit direct to him to pay *pro rata* on all I owe in England, of every description, being about £12,000. Not much, as yet, has reached him; but arrangement for considerable is on the way, and I confidently hope that the whole will be, in the course of ninety days, and sooner, if possible. Very respectfully yours, Nathaniel Goddard."

The result of the defendant's arrangements was such, that through T. Wiggin & Co., he repaid to Baring, Brothers & Co., on account of the plaintiffs, the same amount of pounds sterling, as the plaintiffs had paid in London on account of the bills drawn by the plaintiffs on the defendant's account, as aforesaid, together with interest and notarial charges of protest; and the bills were given up to Wiggin & Co. These payments to Baring, Brothers & Co. were made in the sums, and at the dates following: June 9th 1838—£1276·6·3. April 21st 1838—£1200. July 13th 1838—£3817·16 0.

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The plaintiffs, through Mr. Forbes, received notice, in Boston, of the first of these payments, on or about the 20th of July 1838, when the premium of exchange between this country and England was nine per cent. They received notice as aforesaid, of the second of these payments, on or about the 31st of May, 1838, when the premium of said exchange was 7 3-4 per cent. They received notice, as aforesaid, of the third of said payments, on or about the 5th of August 1838, when the premium of said exchange was 8 per cent. And at the several rates of exchange the plaintiffs might have drawn for those several sums, at Boston, or elsewhere in the United States.

If the bills, drawn by the plaintiffs on account of the defendant, as aforesaid, had gone back to the drawers at Canton, where the usual rate of interest is twelve per cent., this, together with the reëxchange and damages, would have caused a loss of more than 21 per cent. on the pound sterling, reckoned at four dollars and forty four cents of the currency of the United States.

Some other facts, not above stated, were also given in evidence, which are referred to in the opinion of the court.

The case was, by consent, withdrawn from the jury, and submitted to the court, who were to draw all inferences of fact, as a jury might; and the parties agreed that if the law warrants a recovery by the plaintiffs, and the evidence is sufficient as to damages, the case should be referred to an assessor to ascertain, on such principles as the court might direct, the amount of damages to be recovered, and that judgment should be entered for the plaintiffs, accordingly; otherwise, that judgment should be entered for the defendant.

B. R. Curtis, for the plaintiffs.

Bartlett, for the defendant.

Hubbard, J. As the defendant's name does not appear on the bills of exchange drawn by the plaintiffs upon Messrs. T Wiggin & Co., he cannot be liable for any damages arising to the plaintiffs in consequence of the non-payment of the bills by the acceptors, unless upon some separate agreement existing between him and the plaintiffs. If the plaintiffs

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were merely vendors of goods to the defendant, and took the written authority of the agent of Wiggin & Co. to draw on them for £6000, in payment therefor, then they have no claim on the defendant; but their remedy, if they have any, can only be against Wiggin & Co., who authorized them to draw the bills. The first inquiry, therefore, which presents itself is, what was the relation which existed between the plaintiffs and defendant in regard to the transactions out of which the present suit has arisen; whether the plaintiffs were merchants acting on their own account, or agents of the defendant, and transacting business on his account.

The agreement of Wiggin & Co., of March 1st 1836, in consequence of which the bills were drawn, was made by their agent, Hooper, with the defendant, in Boston; and it contained an authority for the plaintiffs (Russell & Co.) to draw bills of exchange at Canton, at six months' sight, on T. Wiggin & Co., London, for account of the defendant; which bills, so drawn by the plaintiffs, the agent of Wiggin & Co. engaged should be duly honored, if drawn within twelve months from the date of the letter. In consideration of this credit thus opened for his account, to be used in Canton, by the plaintiffs, the defendant agreed to remit to Wiggin & Co. sufficient funds to meet the payment of all bills which might be drawn by virtue of that credit, and to give security for the amount, to the satisfaction of Hooper, the agent, at any time when required. This credit was enclosed in a letter to the plaintiffs, bearing the same date with the credit; and the letter states that the credit is remitted to them to be used for his account, and that he wishes the plaintiffs to invest the proceeds in silks and teas, or in such articles as their judgment shall dictate as suitable for the Boston market, and at the lowest rate of freight they can contract for in a first rate vessel. This letter was received by the plaintiffs, and in consequence of it, they negotiated the exchange in the months of August and October 1836, the net proceeds of which, after deducting their commissions, they credited to the defendant, and charged him with an invoice of silks and teas, in October, and which they shipped to his address.

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These transactions do not disclose a sale of the credit to the plaintiffs, and a purchase of goods of them in payment, and thus leaving the plaintiffs to dispose of the bills for their own account; but the plaintiffs, by this letter and their acts under it, were constituted and became the agents of the defendant for the disposition of the exchange for his use and benefit, and for the purchase of goods for his account. The letter is an authority to sell the bills for his account, and to invest the proceeds in goods for him. He thus constitutes them his agents, for this purpose, and they accept the appointment; and he is the principal in the transaction. And though their services are compensated by a commission, yet their relations with the defendant do not cease by the mere disposing of the bills and the purchase of the goods. If bills had been drawn by the defendant, and rendered negotiable by the names of others as payees and indorsers, and the plaintiffs were not required, in the negotiation, to put their names upon the bills, the agency would have been determined on the disposing of the drafts, and the purchasing and shipping of the goods, with the necessary accounts and documents. But the credit of Wiggin & Co. did not contain an authority for the defendant to draw the bills; but the plaintiffs alone could draw them. In sending the credit, then, to the plaintiffs, to be used by them, the defendant, in fact, requested them to draw the bills in their own names, but to negotiate them on his account; and consequently the drawing of the bills by the plaintiffs was for the benefit and at the risk of the defendant. Their names were given for his use and benefit, and, as between themselves and the defendant, as his agents. He therefore became responsible to the plaintiffs to protect them, as the drawers of the bills for him, from all losses by reason of so drawing, not proceeding from their own negligence or default. To the parties who should take the bills, they became responsible as the drawers, if the drawees should fail to accept, or refuse to pay them, not only for the face of the bills, but for the damages arising from their non-acceptance or non-payment. And though they might perhaps have a

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June, wrote to the plaintiffs' house at Canton, and to J. M. Forbes, a member of the house, then in Boston, that they would interfere for the honor of the Canton house, and would protect the bills drawn by them, and should, in the mean time, retain the goods in their hands, consigned to them by the plaintiffs, or the proceeds, when sold, for their security, and should rely on Mr. Forbes to procure the parties in America, for whose account the bills were drawn, to make remittances to meet them, as they arrived at maturity, or upon Forbes himself, to supply them with funds. The bills drawn for account of the defendant fell due at different times, and the first matured on or about the 5th of September 1837. On the 29th of July 1837, Forbes informed the defendant when all the bills would fall due, and inquired of him whether he had taken the necessary steps to meet the bills drawn by Russell & Co. for his account, and if not, what measures he was prepared to adopt to protect the drawers from the consequence of their non-payment; to which the defendant replied that he was happy to state that he had taken such measures as appeared to him sufficient to prevent any bills, drawn for his account, from going back to the drawers. But it turned out that the defendant did not furnish funds to provide for the bills at maturity, and they were left, therefore, to be provided for by the drawers or to be returned to Canton.

In October 1837, after Forbes had received information that the first two bills had been taken up by Baring, Brothers & Co. he informed the defendant of the fact, and that he himself had previously purchased bills on London, at a premium of twenty one per cent. and had remitted an account of the bills drawn for the defendant, and requested a reimbursement. To this the defendant replied, that he was sorry that it had been out of his power promptly to take up the bills of Russell & Co. of Canton, as he had expected; that he was preparing to make payment in London, as fast as possible, and to discharge all that Baring, Brothers & Co. should take up, with their commission, interest and costs of protest, so that all parties might be satisfied; but making no allusion to dam-

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ages on the bills, a reimbursement for which had been claimed by Forbes; not meaning, probably, to commit himself on that subject. The residue of the correspondence, and of the transactions of these parties, is not of a nature to change the legal relations between them.

On examining the testimony in the case, it is apparent that the bills were taken up by Baring, Brothers & Co. as they came to maturity, for the honor of the drawers, and that Forbes furnished funds for their reimbursement, by direct remittances from Boston, in part, and by certain transfers to their credit, on the books of Baring, Brothers & Co., the origin of which transfers is not distinctly stated; but the accounts apparently show that when all the bills drawn by the plaintiffs for account of the defendant, to the amount of £6000, were paid by Baring, Brothers & Co., they had received from Russell & Co. (the plaintiffs) about £4000 towards their reimbursement.

It is proved, then, by the evidence in the case, that the plaintiffs, in consequence of the neglect of the defendant to provide for the bills drawn for his account, at their maturity, have sustained a loss, to make good which they allege they have a legal claim upon the defendant. The defendant avers, on his part, that this claim, if it ever existed, has been extinguished, and if not, that the plaintiffs have not placed themselves in such a situation as to give them a claim against him for damages for not providing for the bills as they matured.

The ground upon which the defendant relies, to show that this claim of the plaintiffs is extinguished, rests upon the following facts, as proved in the case: That the defendant, from time to time, after the bills matured, remitted funds to Wiggin & Co. to pay the same, and that they, by means of those remittances, paid, in the months of April and June 1838, to Baring, Brothers & Co., about £2400 sterling of the bills; and in the month of July following, partly from further remittances from the defendant, and partly from their own funds, they paid the balance of £3600, together with the interest and expenses thereon, and the bankers' commission of one per

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The ground upon which the defendant relies, to show that this claim of the plaintiffs is extinguished, rests upon the following facts, as proved in the case: That the defendant, from time to time, after the bills matured, remitted funds to Wiggin & Co. to pay the same, and that they, by means of those remittances, paid, in the months of April and June 1838, to Baring, Brothers & Co., about £2400 sterling of the bills; and in the month of July following, partly from further remittances from the defendant, and partly from their own funds, they paid the balance of £3600, together with the interest and expenses thereon, and the bankers' commission of one per

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cent., as is usual in such cases; and that on such final payment in July, Baring, Brothers & Co. gave up the bills to Wiggin & Co., without any claim for damages. This payment and surrender of the bills, the defendant contends, were either a waiver of any claim which had been previously made on him for damages, or an extinguishment of such claim, on the ground that the agents of the plaintiffs settled the whole demand arising upon the bills, and relinquished this claim, and that, as agents, they were authorized so to do; and that Wiggin & Co., as the agents of the defendant, made this settlement for him.

If the plaintiffs' claim upon the defendant for damages was founded upon the bills themselves, and the production of them on the trial was necessary to support their claim, as in the common case of an indorsee in a suit against an indorser or the drawer, the defence would be well sustained. But, in the first place, the acceptors supra protest had not only a right to look to the drawers for reimbursement, but also to call upon the other parties to the bill, upon whom the drawers might call for payment, who, in this case, were the acceptors, and consequently they were authorized (not to say bound) to call upon Wiggin & Co. for payment for their own account; but, as between the acceptors supra protest and the original acceptors, the question of damages did not arise, they may also be considered as agents for the plaintiffs, in calling upon Wiggin & Co. for payment, because the defendant had stated to the plaintiffs his intention to pay the bills in London, through Wiggin & Co., and the plaintiffs had so instructed Baring, Brothers & Co., as may well be inferred from the facts in the case. But the claim of the plaintiffs upon the defendant does not rest on the ground that the defendant is a party to the bills and to be treated in the same manner as an indorser, but upon the fact that the plaintiffs, in the due execution of their agency for the defendant, have sustained a loss for which he is bound to reimburse them; and that a payment of the face of the bills and the interest and expenses, and a banker's commission, is only a partial indemnity, and does not make good

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their loss. The settlement, so made with Wiggin & Co., we do not consider as a waiver or extinguishment of the plaintiffs' claim.

The defendant denies that there was any original agreement on his part with the plaintiffs, or any consideration for the contract now attempted to be enforced, and that such bills are drawn every day, on the faith of a letter of credit, without reference to the party who agrees to make the banker good for his letter of credit. But, as we have before held, the sending of the letter of credit to the plaintiffs, with a request to them to use it for his account, in the manner directed, and their accepting the commission, do constitute an agreement between the parties, as principal and agent, and the rights and duties belonging to such relation are created between them; and the drawing of the bills in their own name, thus making themselves responsible as drawers, is a good consideration for the claim of indemnity now attempted to be enforced. And whether bills of this description are drawn without reference to the party who contracts with the banker on whom they are drawn, (as it was said in argument,) must depend on the particular facts in each case, which cannot be developed unless a loss takes place.

But it is contended, that if the defendant was ever liable for damages, it could only be for those damages which would arise upon the return of the bills to Canton, and the payment of damages there by the drawers, and that, in this case, the drawers having interfered for their own benefit, before any of the bills came to maturity, to prevent their return, and having provided funds, from this country or in London, for their payment, they were acting without reference to the defendant, and that he did not become party to such arrange ment, and is not to be in any way affected by it. The reasoning of the counsel for the defendant, on this part of the case, was ingenious, but we cannot admit its correctness. If the relations of the plaintiffs and defendant had been only those which subsist between the parties to a bill of exchange, we should have given more weight to the argument, that the bills

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must be returned upon the parties, and the damages paid in regular course, before the claim could have been enforced; though we are not inclined to yield to its correctness. But these are not the relations of these parties. They are those of an agent seeking to recover an indemnity from his principal, for a loss sustained by him in the faithful discharge of his agency As drawers of the bills, the plaintiffs had a right to prevent their return to India and China, upon their being dishonored by the acceptors, and to make reasonable arrangements, in anticipation of the event of such dishonor, to prevent them from being returned. This is a privilege incident to the relation of every drawer or indorser of a bill; and the right arises from the duty imposed on every merchant to sustain his mercantile credit, and to avoid the payment of heavy damages, which are always consequent upon the return of a bill to a distant country. In the present case, no advantage could by possibility arise to any party from the return of the bills; for the indorsers in India, if called upon, would look to the drawers, and the drawers must make good the loss, by placing the amount claimed of them in London, or by paying, at their place of domicil, its full equivalent. The drawers, then, did, by their agents, Baring, Brothers & Co., in London, what the acceptors were, or, on their default, what the defendant was bound to do. They took up the bills in London, at maturity, and thus prevented great injury to themselves and others.

The plaintiffs were not required, in the execution of their agency for the defendant, in drawing the bills, to provide funds for their payment; and the partner of the house, who was then in Boston, was fully justified in providing those funds; and unless the expense of doing it exceeded what the damages would have amounted to, if the bills had been returned to and paid in Canton, the defendant has neither cause nor right to complain.

Whether the defendant made an agreement, or not, with Mr. Forbes, in regard to remittances, or ratified his acts in remitting to meet these and other bills, (which the defendant denies,) it

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s not necessary, we think, for us to determine; because the claim of the plaintiffs does not rest upon any further contract or new consideration, but upon the original undertaking, implied by law, to protect the plaintiffs from loss in consequence of drawing these bills for his account. It is said that the defendant should not be bound by an agreement made two months before any bill fell due, and when he was making arrangements to pay them at maturity. That is true; and if he had so paid the bills, no claim would have existed against him. The claim arises, not from the executory agreement with Baring, Brothers & Co., but from the actual damage sustained by the plaintiffs in providing funds for these bills, which they were compelled to do, in consequence of the defendant's neglect.

It is said that it may justly be inferred from the testimony both of Mr. Wiggin and Mr. Bates, that the bills would not have gone back to China, if the arrangement had not been made by Mr. Forbes. How this might have been, we cannot now determine. But such a supposition or belief, if it existed even at the time, would not have deprived Mr. Forbes of the right of preventing the bills from going back, or establishing the credit of his house upon stronger foundations than the mere lenity of creditors, or their apprehension that they might possibly suffer more by returning their bills than by retaining them. They protected themselves as drawers, which they had a perfect right to do, and the defendant has no legal or equitable ground of complaint against them for doing it. His ratification of the act is not necessary to entitle the plaintiffs to recover.

We are now brought to the consideration of the question, what damages have the plaintiffs sustained, for which they have a legal claim on the defendant, who has paid the face of the bills, and interest, and the common expenses of protest? Two grounds of claim are made by the plaintiffs; the one for the premiums paid on remittances to London to meet these with other bills; and the other from the loss arising from not drawing against the goods in the hands of Baring, Brothers

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were merely vendors of goods to the defendant, and took the written authority of the agent of Wiggin & Co. to draw on them for £6000, in payment therefor, then they have no claim on the defendant; but their remedy, if they have any, can only be against Wiggin & Co., who authorized them to draw the bills. The first inquiry, therefore, which presents itself is, what was the relation which existed between the plaintiffs and defendant in regard to the transactions out of which the present suit has arisen; whether the plaintiffs were merchants acting on their own account, or agents of the defendant, and transacting business on his account.

The agreement of Wiggin & Co., of March 1st 1836, in consequence of which the bills were drawn, was made by their agent, Hooper, with the defendant, in Boston; and it contained an authority for the plaintiffs (Russell & Co.) to draw bills of exchange at Canton, at six months' sight, on T. Wiggin & Co., London, for account of the defendant; which bills, so drawn by the plaintiffs, the agent of Wiggin & Co. engaged should be duly honored, if drawn within twelve months from the date of the letter. In consideration of this credit thus opened for his account, to be used in Canton, by the plaintiffs, the defendant agreed to remit to Wiggin & Co. sufficient funds to meet the payment of all bills which might be drawn by virtue of that credit, and to give security for the amount, to the satisfaction of Hooper, the agent, at any time when required. This credit was enclosed in a letter to the plaintiffs, bearing the same date with the credit; and the letter states that the credit is remitted to them to be used for his account, and that he wishes the plaintiffs to invest the proceeds in silks and teas, or in such articles as their judgment shall dictate as suitable for the Boston market, and at the lowest rate of freight they can contract for in a first rate vessel. This letter was received by the plaintiffs, and in consequence of it, they negotiated the exchange in the months of August and October 1836, the net proceeds of which, after deducting their commissions, they credited to the defendant, and charged him with an invoice of silks and teas, in October, and which they shipped to his address.

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These transactions do not disclose a sale of the credit to the plaintiffs, and a purchase of goods of them in payment, and thus leaving the plaintiffs to dispose of the bills for their own account; but the plaintiffs, by this letter and their acts under it, were constituted and became the agents of the defendant for the disposition of the exchange for his use and benefit, and for the purchase of goods for his account. The letter is an authority to sell the bills for his account, and to invest the proceeds in goods for him. He thus constitutes them his agents, for this purpose, and they accept the appointment; and he is the principal in the transaction. And though their services are compensated by a commission, yet their relations with the defendant do not cease by the mere disposing of the bills and the purchase of the goods. If bills had been drawn by the defendant, and rendered negotiable by the names of others as payees and indorsers, and the plaintiffs were not required, in the negotiation, to put their names upon the bills, the agency would have been determined on the disposing of the drafts, and the purchasing and shipping of the goods, with the necessary accounts and documents. But the credit of Wiggin & Co. did not contain an authority for the defendant to draw the bills; but the plaintiffs alone could draw them. In sending the credit, then, to the plaintiffs, to be used by them, the defendant, in fact, requested them to draw the bills in their own names, but to negotiate them on his account; and consequently the drawing of the bills by the plaintiffs was for the benefit and at the risk of the defendant. Their names were given for his use and benefit, and, as between themselves and the defendant, as his agents. He therefore became responsible to the plaintiffs to protect them, as the drawers of the bills for him, from all losses by reason of so drawing, not proceeding from their own negligence or default. To the parties who should take the bills, they became responsible as the drawers, if the drawees should fail to accept, or refuse to pay them, not only for the face of the bills, but for the damages arising from their non-acceptance or non-payment. And though they might perhaps have a

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out of breach of contract for the non-payment of money, is usually measured by the interest of money. In this case, the alleged damage is, that the plaintiffs could have availed themselves of the high rate of exchange, or of other advantages, if they had not been deprived of the use of the money which was detained from them, and, as they say, through the default of the defendant. But, viewing the facts in the most favorable light for the plaintiffs, their loss is but suppositive. In the use of the money, instead of realizing great profits, they might have encountered difficulties and sustained injuries unforeseen at the time, and have suffered, like thousands of others. Theirs is not a loss, in the just sense of the term, but the deprivation of an opportunity for making money, which might have proved beneficial, or might have been ruinous; and it is of that uncertain character, which is not to be weighed in the even balances of the law, nor to be ascertained by well established rules of computation among merchants. We are to bear in mind that the property held by the Barings consisted of goods consigned to them by the house in Canton, and that, by the usage between them, the consignees, on the receipt of the goods, and sometimes on receipt of the bills of lading and shipping documents, sent forward remittances to Russell & Co. at Canton, either in specie or bills on India, or in goods, when so directed, to the amount of 50 or 60 per cent. on the value of the respective consignments. But no evidence is furnished by the plaintiffs, to show that such remittances would have resulted in a profit to them, or that they suffered, in any way, by their being retained. Nor does it follow that the consignees would have felt authorized to answer the bills of Mr. Forbes, one of the members of the house, to divert the funds to America, without the approbation of the house itself. And judging from the correspondence, Mr. Forbes himself would have been equally unwilling to make use of those funds here, even should the Barings have consented to charge his drafts to that account; lest he might injure the standing of his house in India, by diverting money that would be payable to the owners of the goods in cases where the plaintiffs

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were merely consignees and not owners. To sustain such a claim as this would be to sanction principles not supported by any decisions with which we are acquainted, and instead of making persons sustain the direct loss arising from their neglect of engagements, it would be to expose them to hazards never contemplated, and to affect them by uncertain speculations in the profits of which they could have no participation, while at the same time they would be made insurers of such profits to their creditors. See *Hayden* v. *Cabot*, 17 Mass. 169. This ground of claim for damages, therefore, on the part of the plaintiffs, must be rejected, and the cause will be sent to an assessor, in accordance with the agreement of the parties, to ascertain the amount of claim for the premiums of exchange on the money they were compelled to advance for the defendant, in consequence of his neglect to provide for the bills as they came to maturity.

[At a subsequent term, judgment was entered for the plaintiffs, for $975·48, and costs.]

WILLIAM P. MUGGRIDGE *vs.* JOSEPH EVELETH.

To maintain an action of trespass for taking and carrying away chattels, the plaintiff must have actual possession, or a right to immediate possession, at the time of the taking. Hence, a bailor of chattels cannot maintain trespass against one who unlawfully takes them from the bailee, during the continuance of the bailment; and this rule holds in case of an attachment of the chattels, by an officer, as the property of a third person.

A vessel may be chartered by an oral contract; and such contract is not determined by the unlawful seizure and detention of the vessel by a stranger.

THIS was an action of trespass *de bonis asportatis*, commenced on the 7th of September 1842, against the sheriff of Suffolk, for the act of his deputy in attaching the schooner Fair Lady, on a writ against Jabez M. Davidson. Trial before *Wilde*, J. whose report thereof was as follows:

The plaintiff's evidence showed that, prior to September 2d 1842, the schooner belonged to Davidson, but that he, on that day, made a bill of her to the plaintiff, and on the next

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day went, with the plaintiff, on board of her, and formally delivered the actual possession of her to him; and that the plaintiff immediately let her, by a parol charter or agreement, for $90 per month, to Joseph Gerrish, who was to victual and man her: That when the schooner was attached, Gerrish was in possession of her, under said charter, being himself the captain, and having on board a crew shipped by himself: That the schooner had part of her cargo laden, and was nearly ready to sail: That the defendant's deputy put a keeper on board; and that Gerrish and his crew remained on board until some time after this action was commenced, when the crew libelled the schooner in the admiralty court, for their wages, and she was sold under a decree of that court, in November 1842.

There was evidence that at the time of the attachment, and also after the service of the writ in this action, Gerrish claimed to be the hirer and master of the schooner, and that he had the whole control over her.

One point made by the defendant, in the opening of the defence, was, that the plaintiff had neither the actual nor constructive possession of the schooner, at the time of the alleged trespass, or at the time of the commencement of this action. But this point was ruled against him, *pro formâ*, and the jury were subsequently instructed, as matter of law, for the purposes of the trial, that the parol charter of the schooner to Gerrish, and his possession under it, did not so change the plaintiff's right of possession, as to prevent his maintaining the action in this form, and that the plaintiff's right of possession was not open for the consideration of the jury, in this case; reserving the point for the consideration of the whole court, if it should become material.

The other and main ground of defence was, that the sale to the plaintiff by Davidson was fraudulent as against his creditors; and upon this point there was much evidence on both sides, which was submitted to the jury with instructions, to which the defendant made no objection.

The jury returned a verdict for the plaintiff, which is to be

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set aside, and a new trial to be granted, if the above *pro formâ* ruling and instruction were wrong.

English & C. H. Parker, for the defendant.

R. H. Dana, Jr. for the plaintiff.

HUBBARD, J. It is a well established principle of law, that to enable a party to maintain trespass *de bonis asportatis*, he must be in the actual possession of the property taken, or, being the general owner, have such an immediate right to possession as will be deemed, in law, constructive possession. *Ward* v. *Macauley*, 4 T. R. 489. *Walcot* v. *Pomeroy*, 2 Pick. 122, 123. *Putnam* v. *Wyley*, 8 Johns. 432. In this case, the possession of the schooner, and the right of possession, were in Gerrish, under his charter, at the time of the alleged trespass, if a parol charter is a valid contract.

The plaintiff's counsel has argued that this case does not stand on the same ground with ordinary actions of trespass, because the suit is against an officer who claims to hold the schooner as the property of a third person; but we are not aware of any such legal distinction. The action is for a tort alleged to have been committed against the plaintiff. He must therefore prove in himself a right to the possession of the property taken; otherwise, he has not sustained the injury of which he complains. And if he does not prove it, though the defendant may be a wrongdoer, in consequence of taking the property, still for such wrongful act he will be responsible, not to the plaintiff, but to the person who was unlawfully dispossessed of his property. It is not, then, sufficient for the plaintiff to show that the defendant is a mere wrongdoer; but he must show that the wrong has been done to himself.

It is said by the plaintiff's counsel, that the defendant's act was the destruction of the entire thing, and consequently the plaintiff can recover, because the general property was in himself. But the seizure of the property is neither an actual destruction of it, nor is it to be so implied. If it were, then replevin would not lie; because the thing itself could not be replevied. But here the schooner could be replevied by a person wrongfully dispossessed, and his writ would be sustained.

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It is also argued that, in cases against officers, damages are given for the entire thing, and not merely damages for the taking. This, however, cannot alter the principle of law, upon which actions of trespass are sustained. If the plaintiff had no right of possession, then the taking is not a direct injury to him; and whatever, and against whomsoever, his remedy may be, it is not to be sought in an action of trespass grounded on his mere right of property, without right of possession. Nor are the damages, in such cases, necessarily the value of the thing taken; they are to be measured by the injury sustained.

It is also contended, that by the taking of the schooner the charter was determined, and so the plaintiff had a right to resume the possession of her, and consequently had a constructive possession, and may therefore maintain this action. In this case, there was a parol letting of the schooner to Gerrish, upon time. It was decided in *Taggard* v. *Loring*, 16 Mass. 336, that such parol letting is valid, and can be enforced; and that case has been repeatedly recognized as law. See *Thompson* v. *Hamilton*, 12 Pick. 428. *Vinal* v. *Burrill*, 16 Pick. 406. So also it has been held that a sale of a vessel by parol is good. *Bixby* v. *Franklin Ins. Co.* 8 Pick. 86. There being, then, a valid contract of letting, the contract was not determined by the unlawful act of the defendant. And in a suit by the present plaintiff against Gerrish, on the contract of charter, proof that the schooner had been unlawfully taken out of Gerrish's possession, without the act or coöperation of the plaintiff, would be no bar to a recovery. Such a dispossession is no determination of the contract; and the party, who is dispossessed unlawfully, must repossess himself of the property, or obtain its value.

Suppose, in this case, that the plaintiff, instead of commencing an action of trespass, had brought replevin against the sheriff, and had been put in possession of the schooner. He could not retain it, as against Gerrish, and if he should refuse to deliver it to him, Gerrish, being guilty of no laches, could maintain an action against the plaintiff for damages, for

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not delivering it; or he might, perhaps, maintain replevin. Two persons, claiming a chattel under distinct titles, cannot lawfully be entitled to the possession at the same time. The right of possession of one must be paramount, and he only can maintain trespass, in case of a wrongful taking of it by a third person. In the present case, Gerrish was lawfully entitled to the possession of the schooner, at the time of the attachment by the deputy of the defendant, and he, therefore, and not the plaintiff, can maintain an action of trespass for the taking, if there has been a tortious taking. The verdict is to be set aside and a

New trial granted.

Knott P. Bray *vs.* John D. Bates & another.

When a bottomry bond is given to secure debts for which simple contract securities have been previously given, the bond cannot be regarded as merely collateral security, but the simple contracts are merged in the bond, and the previous securities cannot afterwards be enforced.

B. made a loan to A., on A.'s vessel, and it was agreed between them, among other things, that any merchandize purchased abroad, with B.'s consent, with the freight money earned on the outward voyage of the vessel, should be shipped to B. for sale on commission: When the vessel was about to sail, B. advanced money to A. on the outward freight, and A. agreed that said freight should be remitted to B.'s correspondent abroad, for B.'s account, B. to account therefor to A.: B. gave direction to the master of the vessel to remit said freight accordingly, except enough thereof to purchase a return cargo of salt at Cadiz, and to ship the salt to order, and send the bill of lading to B.: The master, at A.'s request, wrote to B. agreeing to obey said directions; and he obeyed them, and purchased a cargo of salt at Cadiz, which was shipped by C., A.'s agent, and consigned to order: The master signed duplicate bills of lading, one of which was indorsed by C. and forwarded to B.: Before the vessel returned, A. gave to B. a bottomry bond to secure about four fifths of all that was due from him to B., and a negotiable note, secured by mortgage, for the balance: On the return of the vessel, the master delivered to A. the other bill of lading, which was not indorsed, and A. assigned it to the master, and also gave him a mortgage of the salt. *Held*, that the agreement between A. and B. as to the return cargo, was superseded and extinguished by the bottomry bond and note; that the said assignment and mortgage to the master were valid; and that the master was entitled to the cargo.

Goods were consigned to order, and one of the bills of lading was indorsed by the shipper, who was agent of the owner of the vessel and goods, and was forwarded by the master of the vessel to B., who, on the arrival of the goods, had no other right to them: After the arrival of the goods, the owner indorsed the duplicate bill of lading to the master, and mortgaged the goods to him: B. entered the

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goods at the custom house, as owner, in opposition to the master's attempt to enter them, and took them from the vessel, under a custom house permit, the master being on board, objecting and claiming the goods as his own. *Held*, that this was a conversion of the goods by B., and that he was liable to the master in an action of trover.

Trover for 15,000 bushels of salt. The parties submitted the case to the court, on the following agreed statement of facts:

On the 4th of June 1842, Nicholson Broughton, by his deed of that date, mortgaged said salt to the plaintiff, to secure payment of a promissory note given to him by said Broughton for $3000, payable on demand with interest. The salt was then on board the barque Mary Broughton, which was then, and always before, owned by said Nicholson, and had then arrived at Boston from Cadiz, and of which the plaintiff then was and before had been master. The said note was given to the plaintiff in settlement of an account, which included, among other things, the plaintiff's wages and commissions on the last voyage of said barque.

The salt was shipped at Cadiz, by Alexander Burton, to be delivered at Boston, "unto order; freight for the said goods nothing, being owner's property;" and the plaintiff signed bills of lading, on the 7th of April 1842. When the aforesaid mortgage was made by Broughton, he assigned one of the bills of lading, by this indorsement thereon: "Value received I assign and transfer the within to Knott P. Bray.

N. Broughton."

Before April 1841, the defendants had transacted business with said Broughton, and had lent him large sums of money on various securities. In April 1841, said Broughton was building said barque, and the defendants, at his request, advanced to him $6000 on the same, according to the following agreement: "Boston, April 22d 1841. Loaned to Nicholson Broughton on his ship now building for him by Mr. Currier 3d, at Newbury, six thousand dollars. The conditions of this loan are as follows: A charge of two and a half per cent. commissions on $6000, and interest till paid. Payment to be made in six months; otherwise, an additional commission or

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2½ per cent to be charged. This loan, however, in no event, is to continue longer than six months from this date, unless we consent thereto. A commission of 2½ per cent. on such part of the ship as may be sold. A similar commission on supplies, &c. for sea, and all other disbursements in this port. A commission on the fit or charter, say 2½ per cent., unless a broker is employed, when we are to charge 1¼ per cent. Any investments of freight money in merchandize to be made with our consent, and shipment made to our consignment for sales, on which the usual commission of guaranty, of five per cent., to be charged. For effecting insurance, we are to charge but ¼ per cent. When the ship is ready for sea, if we can agree with Mr. Broughton upon a price to be paid for one half, we will become purchasers, jointly with Captain Samuel Thaxter, who is to command the ship, of one half said vessel; and then the ship to be sailed on our joint risk, and to be engaged in the Havana and Russia trade, or employed in freighting, as may appear most for the interest of the concerned. If we cannot agree upon a price for one half the ship, then the profit or loss on sailing this vessel is to accrue to Mr. Broughton's account. Upon payment of our advances, and settlement of our account, the ship to be conveyed to Mr. Broughton on demand. Bates & Co.

"Agreed to above. N. Broughton."

On the 10th of August 1841, the defendants made a further advance, on the same vessel, of $2271·86, which, by an indorsement upon the agreement last mentioned, was stated to be made upon the terms in that agreement contained. On the 1st of October 1841, said Broughton executed to the defendants an instrument, purporting and intended to be a bottomry bond on the same vessel, to secure the sums advanced as aforesaid. The condition of this bond was in the terms copied in the margin.*

* Whereas the said Bates & Co have this day lent and advanced unto the said Broughton, the sum of ten thousand dollars, at bottomry, on the body tackle and appurtenances of the good bark Mary Broughton of Marblehead, of the burthen of —— tons, the said Nicholson Broughton being the sole owner

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On the 9th of November 1841, when said vessel was about to proceed from New Bedford to Amsterdam with a cargo of oil, the defendants advanced to said Broughton $3500, on the outward freight, and he gave them a receipt for said sum, (stating therein, that the same was indorsed on the agreement aforesaid of April 22d 1841,) and an agreement that the net freight, after defraying certain expenses, should be remitted to their correspondents at Rotterdam, for the defendants' account, they to account for it to Broughton. At the same time, this advance was indorsed, as follows, on said agreement of April 22d: "November 9th 1841. Received on account within, as per memorandum this date, three thousand five hundred dollars. N. Broughton."

Now, the condition of this obligation; that if the said Nicholson Broughton shall pay, or cause to be paid, to the said Bates and Thaxter the sum of eight thousand two hundred and seventy one $\frac{86}{100}$ dollars, as per agreement dated twenty second day of April 1841, and interest thereon, within six months from 1st October 1841, then this obligation to be void; otherwise to be and remain in full force and virtue. And in consideration of, and as security for, said loan as aforesaid, the said bark Mary Broughton is, by these presents, assigned, pledged, mortgaged, set over and conveyed to the said Bates and Thaxter, their heirs and assigns; the certificate of the registry of which vessel is as follows. [Here the registry documents were inserted.]

It being mutually understood and agreed that, in case the amount of said loan and interest, or any part thereof, according to the terms of these presents and the agreement 22d April 1841, shall remain due and unpaid to said Bates and Thaxter, after the expiration of six months, the said Bates and Thaxter may take possession of said bark and appurtenances, and sell the same at public auction, in order to satisfy what may then remain due, without any proceedings in court or otherwise, for the purpose of authorizing such sale, and thereupon may execute and deliver a sufficient bill of sale, to transfer completely to any purchaser or purchasers all title and property in and to the said bark Mary Broughton and appurtenances, to the said Nicholson Broughton, as owner thereof, now belonging. The said Bates and Thaxter thereupon to account to the said Nicholson Broughton for any surplus of such sale, after paying all charges and expenses. And in case of such sale as aforesaid, the said Nicholson Broughton, executors, administrators, or assigns, shall, whenever thereto requested, make, execute and deliver to such purchaser or purchasers another bill of sale of said bark and appurtenances, in which the register shall be recited as above, for the transferring completely to said purchaser or purchasers all the rights, interests and claims of said Nicholson Broughton, executors, administrators or assigns, as owner of said bark Mary Broughton.

N. Broughton, (Seal)

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On the 30th of November 1841, the defendants wrote to the plaintiff the following letter: "You will have been informed by Mr. N. Broughton of our arrangement with him to receive, in Europe, the proceeds of the freight of the barque under your command, for which we are to account to Mr. Broughton in Boston. It is our understanding that you are to remit from Amsterdam, to our friends, Brothers Nottlebohm, Rotterdam, for our account, all of your outward freight money, excepting enough to pay your necessary expenses at Amsterdam. And, in the event of your going to Cadiz, you are to retain enough to purchase there a cargo of salt for this market, to our consignment. Should no other preferable employment offer for the barque, and you be induced to go to Cadiz for salt, you will be particular to give us early advice of your intention, that we may effect insurance. You will please acknowledge receipt of this letter as your instructions regarding the disposition of the outward freight money. Should you load salt at Cadiz, the same may be shipped 'to order,' and the bill of lading sent to us. We remain, &c.

Bates & Co."

On the 8th of December 1841, Broughton wrote his letter of instructions to the plaintiff, as master of the barque, and directed him to proceed with the outward cargo to Amsterdam, and deliver it there; and if no freight should be offered for the United States, that would give a certain specified sum, to proceed to Cadiz for a cargo of salt, after retaining enough of the freight money to defray the necessary expenses at Amsterdam, and to purchase salt at Cadiz; and to remit the balance of said freight money to Brothers Nottlebohm, at Rotterdam, for the account of the defendants; and to advise Broughton of the plaintiff's proceedings; and to return to Boston, touching at Marblehead, if the wind should be favorable; the plaintiff to be allowed $80 per month, wages, and two per cent. on the amount of the freight home, valuing the freight on the salt at $2000, in lieu of perquisites. The plaintiff, in writing, at the bottom of a duplicate of these instructions, held by Broughton, agreed to comply therewith.

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On the 9th of December 1841, the plaintiff replied to the above letter of the defendants of November 30th, that he had received it, and would bear it in mind, on his arrival in Europe. On the next day (December 10th) Broughton wrote to the plaintiff stating that this reply to the defendants' letter was not such as they desired, and requested that the receipt of that letter should be acknowledged by the plaintiff, in this form: "Your letter of 30th November is received, and due note made of its contents. As directed by you, and instructed by Mr. Broughton, I will remit to Brothers Nottlebohm the amount of my outward freight, less the necessary expenses of the barque at Amsterdam, and enough to purchase a cargo of salt, should I decide to go to Cadiz. In this case the cargo is to be consigned to order, and a bill of lading sent to you, with timely orders for instructions." And on the 11th of December 1841, the plaintiff addressed a letter to the defendants in the precise terms above proposed by Broughton.

The said barque sailed, on the 12th of December 1841, under the plaintiff's command, and the outward freight, after reserving enough to defray the expenses at Amsterdam, and to purchase a cargo of salt at Cadiz, where the plaintiff decided to go, was remitted, agreeably to instructions. The plaintiff proceeded to Cadiz, and through the agency of Alexander Burton, the American consul there, purchased, with the reserved freight money, a cargo of salt. The invoice thereof, dated April 5th 1842, signed and certified by said Burton, stated that the cargo was shipped by order of the captain, Bray, and consigned to order. The bills of lading of the salt were as hereinbefore stated. One of these bills was indorsed by said Burton, and forwarded by the plaintiff to the defendants, in a letter dated April 8th 1842, saying that it was done "as per instructions," and was received by the defendants before the arrival of the barque. They thereupon made a contract for the sale of the salt, and Broughton, upon hearing thereof, called on them and said he would not sanction it. The other bill of lading, with the invoice, was delivered to Broughton, by the plaintiff, on the arrival of the barque, and

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Broughton indorsed this bill, and delivered it to the plaintiff, as before stated. These bills were dated April 7th 1842, and the barque sailed for Boston, from Cadiz, on the next day.

Before this time, Broughton was indebted to the defendants for a loan of $6000, made on the 1st of February 1841, upon one half of his barque Chusan, and for an advance of $4000, made on the 13th of September 1841, upon one half of his barque Zotoff, secured by bonds in form like that respecting the Mary Broughton, hereinbefore described; for an advance of $6000 on a barque then building, and on the stocks at Newbury, part of which sum, viz. $4457·09, was advanced January 11th 1842, and the residue January 27th 1842; for an advance of about $1500 on a cargo of salt at Marblehead, consigned by Broughton to the defendants; and for the aforementioned loans on the Mary Broughton, with the $3500 indorsed on the aforesaid agreement of April 22d 1841, and charged in the defendant's account, hereinafter mentioned, as an advance "on the Mary Broughton's freight to Amsterdam," and as stated in the aforesaid agreement of November 9th 1841.

At the time of the advance of $4457·09, above mentioned, a contract, dated January 11th 1842, was made between the defendants and Broughton, stating that the barque aforesaid, on the stocks, should be held in mortgage for that sum, and for any further sums that might be advanced, not exceeding $6000.

In March 1842, the defendants, holding the aforesaid instruments intended as bottomry bonds, and the mortgage on the said barque on the stocks, were advised by counsel that it was doubtful whether said bonds were any thing more than mortgages, and that the said cargo of salt at Marblehead, though nominally pledged to them, being in the possession of Broughton, was liable to attachment by his creditors. The defendants thereupon proposed to Broughton that he should carry into effect their original intentions, by giving them possession of the cargo of salt, (which was done,) and by executing other bottomry bonds. He acceded to this proposal, and counsel were instructed

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by the defendants to prepare such bonds. At this time no mention was made of any agreement as to the freight of the Mary Broughton, and no instructions were given relative thereto. While the papers were in preparation, the defendants made up their account with Broughton, to March 1st 1842, including the loans and advances aforesaid, and all their demands against him, and their liabilities on his account, commissions, liabilities on premium notes, &c. and the said sum of $3500, stated to have been an advance on the Mary Broughton's freight; and the cash balance, in favor of the defendants, was the sum of $34,598·87. This balance was divided into four sums, for one of which, $17,000, a new bond was given on the Mary Broughton; for another of which, $8000, a new bond was given on the Chusan; and for another of which, $5000, a new bond was given on the Zotoff. [These bonds secured a marine interest of eleven per cent., &c., as stated in the opinion of the court, *post.* 249.] For the remaining sum of $4598·87, said Broughton gave a promissory note to the defendants, payable in one month, with interest, and also made to them a mortgage, to secure said note, of the new barque aforesaid, on the stocks, in which mortgage it was also stipulated that said barque should be held by them for any moneys that might be due on the three bottomry bonds aforesaid. At the same time another instrument was executed by said Broughton to the defendants, stating the said bottomry bonds and mortgage, and the pledge of the said salt at Marblehead, and that the new barque and the salt were of greater value than the amount lent thereon, and that the defendants had requested further security for the sums lent on bottomry, and agreeing that the new barque and the salt should be held for such sums and interest, as might be due on the aforesaid loans, and interest. The said bottomry bonds, mortgage and agreement were all executed on the 5th of March 1842; so that the whole amount of said balance of $34,598·87, was covered by these securities. When they were executed, it was said by the counsel who prepared them, in reply to a question put by said Broughton, and in presence of the defendants, that the

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old bottomry bonds would of course be given up, when the new ones should be delivered; but no allusion was made to any lien on the freight of the Mary Broughton, or the proceeds of said freight. At the same time, the defendants engaged to make a further advance to said Broughton, and afterwards did advance to him the sum of $2600. They also gave to the said Broughton the following writing: "Boston, 5th March 1842. Dear Sir: In giving us the mortgage to-day on the whole of the new vessel which you are now building at Newbury, we agree that when she shall be fully equipped for service, we will reconvey to you one fourth (¼th) share, or, if sold in that state, we will pay over to you one fourth of the money we may obtain for her.

Bates & Co."

At that time, (March 5th 1842,) and for some time afterwards, the defendants supposed that the security held by them was more than sufficient to satisfy all their demands. They afterwards sold the salt at Marblehead, and carried the proceeds thereof to Broughton's credit on account.

The Mary Broughton arrived at Boston on the 4th of June 1842, very early in the morning; and while she lay in the stream, and before her arrival at the wharf, the master (the plaintiff) left her in charge of the first mate, and went to Marblehead, where Broughton resided, and returned to Boston, with him, early in the same forenoon; and Broughton, soon afterwards, on the same day, made the mortgage and assignment of the bill of lading, before mentioned, to the plaintiff.

In the mean time, while the plaintiff was absent from the vessel, the defendants sent a person on board, after she arrived at the wharf, to take possession of her and of the cargo. In the afternoon of the same day, and after the making of the mortgage by Broughton to the plaintiff, the defendants asked the plaintiff for the invoice. He refused to deliver it up, and claimed the salt, as having been conveyed to him as aforesaid.

After the arrival of the vessel, and before she was entered at the custom house, the defendants applied to enter the salt

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but the officer declined to enter it, "because it is not in rule to enter the cargo before the vessel." On Monday, June 6th, the officer sent for the plaintiff to enter the vessel; and when he arrived at the custom house, Thaxter, one of the defendants, was waiting there to enter the salt; and as soon as the vessel was entered, the officer took up Thaxter's papers and proceeded to enter the salt. The plaintiff claimed to enter it, and for that purpose presented an entry, with a bill of lading consigned to order, not indorsed by Burton, but by Broughton, to him. Thaxter exhibited one indorsed by Burton, and the officer said that gave him the right to enter it. The plaintiff remonstrated against his being permitted to do so. The entry was made by the defendants, *as owners*, and completed, and they gave bond to produce an invoice and pay duties. Soon afterwards, in pursuance of a permit, the defendants took the salt from the vessel, (the plaintiff being on board and objecting, and claiming it,) and disposed thereof, crediting the net proceeds to Broughton. The plaintiff remained master of the vessel, and was, from time to time, on board, until the salt was taken away by the defendants.

When Broughton made said mortgage and said assignment of the bill of lading to the plaintiff, he was in embarrassed circumstances; and on the 11th of July 1842, he filed his petition to be declared a bankrupt, but had not been so declared when this action was commenced.

It was agreed by the parties, that if the plaintiff, on the foregoing facts, was entitled to recover, the case should be referred to a master or auditor, to assess the damages, and that, upon acceptance of his report, judgment should be rendered for the plaintiff; otherwise, that judgment should be rendered for the defendants. It was further agreed, that all the papers referred to in the foregoing statement of facts, and not therein set forth at large, should be considered as part of the case.

B. Rand, for the plaintiff.

F. C. Loring, for the defendants.

Hubbard, J. Upon the facts stated in this case, the defend-

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ants claim the property in the salt, by force of the agreements of April 22d, and November 9th 1841, and they set up an actual possession of it, by virtue of taking possession of the vessel, and of their right to possession by force of the bill of lading. But we are of opinion that the possession in this case was constructive, and not actual, and is dependent upon the right of property. If, therefore, the right of property was in the plaintiff, by force of the mortgage and assignment of the bill of lading to him, the constructive possession of the defendants will not avail them, supposing the plaintiff's action to be rightly brought.

A bill of lading of goods consigned to order, it is said, imports an engagement on the part of the master to deliver the goods to the person to whom the shipper shall order the delivery to be made; and such person becomes the consignee of the goods. Considering this as a general proposition, there is no doubt of its correctness; but if the shipper be a mere agent for the owner of the vessel and of the cargo shipped, and a new agreement is made between such owner and the consignee named by the shipper, after such consignment, by which the right to the consignment is affected, and in consequence of it the owner assigns his interest in the cargo, the consignee of the shipper cannot hold it, on its arrival, by the mere force of the bill of lading and the order to deliver the cargo to him, against the assignee of the owner. The possession of the bill of lading by the consignee is only *primâ facie* evidence of title, and of a right to the consignment, and may be rebutted by the lawful owner.

The defendants contend that they had the right to the possession of this salt, by virtue of the agreement of April 22d 1841. It is there provided, that "any investments of freight money in merchandize to be made with our [defendants'] consent, and shipment made to our consignment, for sales, on which the usual commissions and guaranty of five per cent. to be charged." This provision is no assignment of such freight, and is a mere agreement for securing a *del credere* commission on the consignment. If, therefore, the cargo —

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the proceeds of the freight money — had been consigned to a third person, the defendants could not have maintained a right to the possession of it for the purpose of securing their commission, and their resort must have been to an action on the agreement. But where such freight was invested in merchandize, and the consignment actually made to them, we think they could lawfully claim and hold such consignment, if the agreement which contained the provision still continued in force. But if the agreement had been settled by the parties, and merged in other contracts, the stipulation would fall with the agreement, and the defendants could not claim the consignment, against the superior title of the owner, provided the defendants' claim rested on no other foundation than the agreement.

It has been argued for the plaintiff, that the bond given by Broughton, in October 1841, called a bottomry bond, but in fact a mortgage, was a merger of the simple contract debt provided for in the agreement of April 1841. But this bond or mortgage was given as collateral security only, for the purpose of more effectually making the vessel subject to those claims, and not to cancel or extinguish their prior engagement; and consequently it could not operate as a merger.

In regard to the advance upon the freight, on the 9th of November 1841, and the transactions growing out of it, we think the master, by sending the bill of lading, indorsed by Burton, to the defendants, gave them such a constructive possession of the salt, on its arrival, that independently of the transactions of March 1842, they would have a good right to claim and retain this cargo, notwithstanding the mortgage and assignment of the bill of lading to the master.

The case turns, in our judgment, on the question whether the transactions of March 5th 1842 were a merger of the preceeding simple contract debts, or were merely collateral securities for the balance of the account then stated.

The facts appear to be these: The defendants were dissatisfied with the manner in which their securities stood, and they proposed to Broughton to make such changes as would

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be satisfactory to themselves; and, preparatory to such changes, they stated their account with him, which showed a balance of $34,598·87 in their favor. In that account is charged the $3500 advance on the freight, and a commission of 2½ per cent., $87·50, on such advance, with a premium of insurance of $100 on $4000, the estimated value of the outward freight, and $22·50, commissions for effecting the same; and a further commission, on the outward freight itself, of $54·81, on $4384·65; on which several sums together, making $3765·81, interest is cast to March 1st 1842. We cannot think, therefore, as has been argued by the defendants' counsel, that the subject of the return freight could have been overlooked or forgotten. The settlement of the accounts, showing a balance, including interest to March 1st 1842, of $34,598·87, was made as follows: Broughton gave the defendants three bottomry bonds, one on the Mary Broughton for $17,000, one on the Chusan for $8000, and one on the Zotoff for $5000. And for the balance of $4598·87, a note was given payable in one month, secured by a mortgage on a new vessel building at Newbury, and by a quantity of salt at Marblehead; and if the note should not be paid at maturity, the defendants were authorized to sell the vessel. The parties also agreed, by an instrument of even date, that the property thus mortgaged was more than sufficient to secure the note, and that the surplus should be held as security for the bottomry bonds and interest; with a further agreement, that Broughton would pay them such sums as they might pay for insuring their interest in said vessels, or any of them, as lenders on bottomry.

The bottomry bond on the Mary Broughton was for a loan of $17,000, and a marine interest of eleven per cent., to be paid on the arrival of the vessel from her said voyage to Amsterdam; and in case of loss, the lenders were to have all the salvage; and if the vessel were lost by any of the perils covered by a policy of insurance, agreeably to the form of the Equitable Mutual Insurance Company, against total loss, the obligation was to be void. The bonds on the other vessels

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were similar, in their terms, as to payment, and as to securing a marine interest.

These obligations and notes were not taken as collateral security for the balance of the account; they contain no reference to it. And the sums lent on bottomry stand on a higher and different security.

Bottomry is a contract by which the ship, or, as it used to be said, the keel or bottom of the ship is pledged to secure the payment of money borrowed by the owner to fit her for sea, repair her, &c.; and the agreement is, that if the ship is lost by any of the perils enumerated in the contract, the lender loses his money; but if the ship arrives safely, or is in safety at the termination of the time stipulated for the repayment of the loan, he is to receive back his principal sum and a marine interest, at the rate agreed upon, though it exceeds the legal interest; and in this event, the ship and the borrower himself are equally liable to the lender. If such a contract as this, when merely taken as collateral security for another debt to be paid at all events, could be enforced, it would be a means of avoiding the statute of usury, and of thus sustaining illegal and oppressive contracts; for the creditor would have his remedy on the vessel, and on the insurance; and on the debtor himself, although the vessel might be lost. He would thus be entitled to the payment of his account and simple interest on it, at all events, and a marine interest on the bottomry bond, in case of the safe arrival of the vessel. If it were not so, it would be a mere mortgage. But these defendants were not satisfied with a mortgage. They chose to put by far the greater part of their debt upon bottomry security and a marine interest; and they procured the papers to be drawn by counsel learned in the law. It is argued that they did not intend to extinguish the debts due from Broughton, or to release any securities held by them, but only to amend legal defects in the assignment of some of the securities, and not affecting their claims upon this freight. But we cannot act upon after expressed intentions. We must decide the case upon the rights of the parties, as expressed by

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their acts at the time, by giving the correct legal meaning and import of those acts. And we are of opinion, that as to the $30,000, the taking of the bottomry bonds was a security differing, not in form merely, but in the nature of the liability, and that it essentially changed the character of the debt from one of simple contract to that of an obligation under seal, and of a peculiar nature, giving the right to receive a higher rate of interest, and putting the principal of the debt at hazard. And in making the proper entries on their books, the bonds would be credited to the account of Broughton; and, also, the note and the account would be balanced, supposing all the vessels should be lost during the pendency of the marine risk, and by perils covered by the agreement. Could the defendants resort to their account, and call on Broughton for payment, and recharge the bonds to him? Clearly not. For the bonds would be paid by the loss, and the defendants' only remedy would be on their insurance. But if they were taken as collateral security merely, then the loss of the vessels would touch the subject of security only, and not the matter of the account. The residue of the account ($4598·87) was paid by the note which was fully secured. The case of *Thorndike* v. *Stone*, 11 Pick. 183, has been cited by the defendants' counsel. But that case merely settles that property may be mortgaged to secure the condition of a bottomry bond. If the bond is avoided by a loss of the vessel, then the mortgage also would be defeated by it. And this kind of security, also, the defendants did resort to, by the agreement in relation to the proceeds of the ship and of the salt at Marblehead, after paying the note.

It has also been argued, that in the settlement of March 5th 1842, no allusion having been made to the agreement of April 22d 1841, the parties did not intend to vary it in relation to consignments to the defendants of investments of freight, or in relation to the securities given for the advances; that even if it was a merger of the debt, it was not a rescission of the contract touching the employment of the vessel. But we are of opinion that the agreement related especially to the

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security of the moneys advanced, and the manner in which the defendants should be compensated for their advances. These moneys were charged in the account, and on the payment of the moneys the agreement would be determined. But the change of securities was equivalent thereto. It was a merger and extinguishment of the preëxisting agreements, so far as they remained executory; and other and new agreements were substituted.

In the view thus taken of the relation of the parties on the return of the barque Mary Broughton, we are of opinion, that the agreement to give the defendants the proceeds of the salt, in part payment of the account, had become extinct; that the salt remained the property of Broughton, freed from their lien; and that he had the right to make sale of it, or assign it as security for a debt due from him. The parties might have made a new agreement in relation to the salt, but they did not; and the old agreement is merged in the new contract. The plaintiff, therefore, has acquired the property in the salt, by virtue of the assignment to him.

It has been further objected, that the plaintiff cannot maintain this action, because there has been no such demand by him, and refusal by the defendants, as to constitute a conversion of the property. If the claim of the defendants had been merely that of a right to sell the property on commission, and to account with the plaintiff for the net proceeds, perhaps no question would have arisen between the parties. But the defendants claimed the property as their own, with a right to appropriate the proceeds independently of the plaintiff's claim; and we think their insisting on the right to enter the cargo, under the permit from the custom house, in opposition to the master's (plaintiff's) attempt to enter it, and then taking the same from the vessel, notwithstanding his objection thereto, and his again claiming it as his, constituted a conversion of the property, and that the plaintiff can well maintain this action. His act, in sending the bill of lading to the defendants, was in pursuance of orders given prior to the new agreement between Broughton and the defendants, which

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were superseded by such new agreement, and Broughton was thereby enabled to give the plaintiff a title, notwithstanding the form of the shipment; Broughton becoming the absolute owner of the property.

According to the agreement of the parties, an assessor must be appointed to ascertain the damage which the plaintiff has sustained, and judgment rendered for him hereafter.

COMMONWEALTH *vs.* BARNABAS RICE.

The fifth section of the by-law of the city of Boston, passed on the 2d of March 1843, for the regulation of Faneuil Hall Market, is valid, which provides that "no inhabitant of said city, nor any inhabitant of any town or city, whose dwelling-house is less than twenty miles distant from said market, shall, at any time, without the permission of the clerk of said market, occupy any stand therein, with cart, wagon, sleigh, or otherwise, for the purpose of vending any articles within the limits of said market, unless he shall, before selling or offering to sell such articles, satisfy the said clerk, when requested, that all the said articles are the produce of his own farm, or of some farm not more than three miles distant from his dwelling-house."

It is a violation of said section, for an inhabitant of Boston to occupy a stand within the limits of the market, and there offer for sale articles which are the property of a person residing more than twenty miles from the market, as the agent of such person, and by his direction, without satisfying the clerk of the market, when requested, that the articles are the produce of such inhabitant's own farm, or of some farm not more than three miles distant from his dwelling-house.

A stand may be occupied, within the meaning of said section, by a person's having a box, within the limits of the market, containing articles for sale, and offering them for sale.

A complaint for violation of said section is sufficient, if it allege that the defendant, without satisfying the clerk, &c., occupied a stand, within the limits of the market, with a box, for the purpose of vending articles there, without alleging that the box was of such a size as to be capable of being used as a stand.

The first section of said by-law does not require that the clerk of the market, before entering a complaint for violation of the regulations of the market, should have the direction of the mayor and aldermen to make such complaint.

THE following complaint against the defendant was made to the police court of the city of Boston, on the 22d of November 1843, by Daniel Rhodes, clerk of Faneuil Hall Market: "That the said Rice, on the 18th of November 1843, at said Boston, with force and arms, being an inhabitant of Boston, did, without the permission of the said Rhodes,

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then the clerk of the Faneuil Hall Market in said city, on the sidewalk of South Market Street, the same being within the limits of said market, occupy a stand with a box, for the purpose of vending sundry articles within the limits of said market; and that said Rice did then and there offer certain articles for sale; and that, before offering said articles for sale, said Rice did not satisfy the said Rhodes, though requested by said Rhodes so to do, that all the said articles, so offered for sale, were the produce of his own farm, or of a farm not more than three miles distant from the dwelling-house of said Rice: And the said Rice, being thereupon directed by said Rhodes to remove, with said box, without the limits of said market, in half an hour, did not so remove, but did there remain, for more than one hour after being so ordered to remove; contrary to the form of the statute of said Commonwealth and the by-law of said city."

The by-law, on which the complaint was framed, is recited in the opinion of the court.

The defendant was convicted and fined by the police court, and appealed to the municipal court. At the trial in the latter court, "there was evidence that the defendant, at the time named in the complaint, offered for sale, in South Market Street, some poultry contained in a box; and that, being directed by said Rhodes, clerk of Faneuil Hall Market, to remove out of the limits of said market, he neglected so to do. It was admitted by the attorney for the Commonwealth, that the poultry was, at the time it was so offered for sale, the property of a person residing in New Hampshire, and more than twenty miles from Boston; and there was evidence tending to show that the defendant was selling as agent of said owner, and by his express direction. The defendant's counsel requested the court to instruct the jury, that if they were satisfied that, in offering said poultry for sale, he was acting as agent, and by the direction of a person residing more than twenty miles from Boston, to whom the poultry, at the time it was so offered, belonged, they should find a verdict of not guilty; that the Commonwealth must

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prove that the clerk of said market, at the time he ordered the defendant to remove, was acting under the express direction of the mayor and aldermen of the city; that being in South Market Street with a box, and offering poultry for sale therefrom, according to the allegation in the complaint, and the proof offered, was not occupying a stand, within the meaning of the fifth section of the city by-law of March 2d 1843, and that, therefore, the Commonwealth must prove that the defendant was incumbering some place within the limits of said market; and that the fourth and fifth sections of said by-law were void for unreasonableness, and because in restraint of trade. The court declined giving the instructions requested, but instructed the jury that the by-law was valid; that if the defendant was an inhabitant of Boston, or of any place within twenty miles of Boston, it was no defence that he was acting as the agent, and by the instruction, of an absent person residing more than twenty miles from Boston, who was, at the time the poultry was offered for sale, the owner thereof."

The jury found a verdict of guilty, and the defendant alleged exceptions to the instructions of the court. He also filed, in this court, a motion in arrest of judgment.

Dodge, for the defendant.

S. D. Parker, for the Commonwealth.

Shaw, C. J. This complaint was founded upon a by-law of the city, passed March 2d 1843. The first and second sections provide for the appointment of a clerk of the market, and prescribe his duties. The third fixes the limits of the market, which include North and South Market Streets. The fourth regulates the standing of carts, &c., and the removal of horses, cattle and other incumbrances. Section fifth is the one on which the complaint is founded. It provides that "no inhabitant of the city of Boston, nor any inhabitant of any town or city, whose dwelling-house is less than twenty miles distant from said Faneuil Hall Market, shall, at any time, without the permission of said clerk, occupy any stand therein, with cart, wagon, sleigh *or otherwise*, for the purpose of vending any articles within the limits of said market, unless he

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shall, before selling or offering to sell such articles, satisfy the clerk, when thereunto requested, that all the said articles are the produce of his own farm, or of some farm not more than three miles distant from his own dwelling-house; and every person, occupying any such stand, contrary to these provisions, shall, when directed by the said clerk, forthwith remove without the limits of said market."

The defendant's counsel, on the trial, prayed the court to give various instructions in matter of law, which the judge declined, but instructed the jury, that if the defendant was an inhabitant of Boston, or any place within twenty miles, it was no defence that he was acting as the agent and under the instruction of a person residing more than twenty miles distant, who was, at the time, owner of the poultry offered for sale.

1. The first exception taken is, that this instruction was wrong, and that the law, in effect, authorizes persons, living more than twenty miles distant, to use these premises, without complying with the terms of the by-law; and that what they have a right to do themselves, they have a right to commission another to do. The court are of opinion that the instruction was right, and that the exception cannot be sustained. It is only by implication, that persons living more than twenty miles distant, or the persons they employ, living more than twenty miles distant, can stand in the market. The maxim, that whatever one is authorized to do himself, he may do by attorney, has its limitations; and one is, when it is expressly prohibited by law. Here it is expressly prohibited; "no inhabitant," &c. "shall occupy any stand," &c. The terms are clear; and we think the object of the by-law is obvious. It is founded on the old policy of the law inhibiting forestalling. It is intended to secure these stands for persons coming to market, with provisions, from a distance, or persons coming to sell their own or their neighbors' produce. The very purpose of the enactment is, to secure a dealing between the producer and the consumer, without the intervention of any intermediate agent. The next section of the by-law (§ 6)

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strongly confirms this construction. It provides, "when any person, lawfully occupying any stand in the streets, within the limits of said market, shall employ any servant or agent to sell, in said market, any articles for him, or on his account, such servant or agent shall not sell any articles upon account of any other person than the person so employing such servant or agent; nor shall any person, lawfully occupying a stand, as aforesaid, be permitted to purchase any provisions or other articles, within the limits of said market, for the purpose of selling the same therein, nor to sell, within said limits, any provisions or other articles, for or on account of any person not lawfully entitled to a stand within the same." If, therefore, the owner of produce, living more than twenty miles from Boston, wishes to send his articles to the Boston market, and does not choose to come himself, or send his own agent, he must employ a factor who may lawfully sell on commission, without occupying the free stands intended for the encouragement and accommodation of farmers, gardeners and other producers, coming to market with their own produce.

2. Another exception is, that the clerk is to exercise his authority under the control of the mayor and aldermen, and that it does not appear that the mayor and aldermen directed this complaint. The first section of the by-law provides that "the clerk shall, under the control of the mayor and aldermen, have the care and superintendence of said market, and it shall be his duty to preserve order in said market, and to execute and carry into effect all the regulations, orders and ordinances, which may be duly made; and it shall be his duty to enter complaints for any violations of said regulations," &c. This gives the general control to the mayor and aldermen, but does not require their direction to each act of the clerk. On the contrary, it is expressly made his duty, by the by-law itself, to preserve order, &c., and especially to enter complaints for any violations of the orders, &c. for the regulation of the market.

3. It was insisted, that although having a box within the limits of the market might be complained of, as an incum-

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brance, under § 4, it could not be charged as occupying a stand, within § 5. We think the act might have been complained of under either section, according to circumstances. It might be an incumbrance, and it might also occupy a stand for the sale of provisions. If the latter was the actual use and purpose, and if a stand could be so occupied, it is a case within § 5, whether within § 4 or not.

4. The next objection is plausible, but we think not sound. It is insisted, that a box cannot come within the enumeration, in the fifth section, of modes of occupying a stand. The words are, "with cart, wagon, sleigh *or otherwise*, for the purpose of vending," &c.; and it is urged that, under a well known maxim of construction, the word "otherwise" can only include things *ejusdem generis*, and that, as all the articles in the enumeration are vehicles, capable of being moved by horses or cattle, it cannot include a box.

The maxim is no doubt a sound one, but it is to be applied, with discrimination, to the subject matter, with a view to accomplish the purposes of the act. The purpose of the by-law was, to prohibit the use of a part of the market as a stand for the sale of provisions, with a receptacle capable of holding and displaying such provisions. Cart, wagon and sleigh, are specified, but it is cart, wagon or sleigh, with the horse removed, and used only for the time being as such receptacle. We believe that the species of sleigh commonly used for carrying provisions to market is usuallly called a lumber-box. Now the point of likeness to be regarded is, not the capacity of being moved by a horse, but the capacity of being used to hold and display provisions for sale. A box, therefore, of suitable dimensions to hold and display provisions for sale, is an article *ejusdem generis*, within the clause of the by-law. The same rule, we think, would apply to a bench, stall, or table, used for the like purpose.

5. It is contended that the by-law is contrary to common right, in restraint of trade, against public policy, unreasonable and void. But the court are of opinion that the by-law is not open to these objections. The city have, at great expense

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provided these accommodations; and they have a right so to control them, as best to promote the welfare of all the citizens. And we think they are well calculated to promote the public and general benefit, as well of the country as the city, by securing free and convenient stands for actual producers, and those who reside at a distance.

6. The last objection is, that the complaint is defective, in stating that the defendant occupied a stand with a box, which might be a small box, incapable of being so used. This objection is not tenable, unless the court can say that no box of any dimensions can be so used as to occupy a stand; which we certainly cannot say, because a large box may be, and often is so used. If, in fact, it was a small box, as it was suggested, in the argument, that it might be, it was rather matter of evidence, than of averment, that it was a small box, not adapted to the purpose of holding provisions for sale. The court should have been requested to charge that it was insufficient to support the averment in the complaint, or to leave it to the jury, on the evidence, with proper directions.

These views, it is believed, embrace all the points arising as well on the motion in arrest of judgment as on the bill of exceptions. *Exceptions overruled.*

COMMONWEALTH *vs.* WILLIAM HASTINGS.

A police officer of the city of Boston, appointed under *St.* 1838, *c.* 123, with all the power of a constable, except that of serving civil process, who arrests an intoxicated person, while guilty of disorderly conduct, and releases him on his promise to go directly home, may lawfully retake him, on his going into a bar room before he is out of the officer's sight.

L. was appointed, by the mayor and aldermen of Boston, under *St.* 1838, *c.* 123, "a police officer (at the National Theatre) with the power of a constable, except the power of serving civil process." *Held*, that if L.'s power was limited to a part of the city, yet that it was not limited to the space within the walls of the theatre, but extended to the environs, so far as the special vigilance of an officer might be required to keep the peace and preserve order among persons frequenting the theatre, or carrying others to and from it, or supplying refreshments; and also to shops, stalls and stands, kept in the vicinity, for the purpose of supplying refreshments.

THE indictment against the defendant alleged that he, at Boston, on the 26th of April 1844, "with force and arms, in

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and upon one Grant Learned an assault did make, said Learned then and there being a police officer of the city of Boston, and then and there being in the lawful discharge of his duty as such police officer, and him then and there did beat, bruise, wound and evil treat, and did then and there obstruct, hinder and oppose said Learned, in the discharge of his duty as such police officer, and which he, the said Learned, was then and there attempting lawfully to perform."

At the trial in the municipal court, there was evidence tending to prove that, on the 26th of April 1844, one Davis was intoxicated, and conducting himself in a disorderly manner, at the National Theatre; that said Learned thereupon arrested him, and took him from the theatre towards the jail or watch house; that after they had proceeded a few rods on their way, Learned released Davis, on his promise to go directly home; that Davis thereupon, while still in sight of Learned, went into a bar room near the theatre; that Learned immediately followed him, and retook him in the bar room, for the purpose of conveying him to jail; and that the defendant thereupon interfered, and obstructed Learned.

The only authority, under which Learned acted, appears in the following certificates, which were not objected to as incompetent or insufficient evidence of the facts therein recited: "City of Boston, July 31st 1843. I, the subscriber, do hereby certify that Grant Learned has been duly appointed, by the mayor and aldermen, a special police officer, for the year ensuing. S. F. McCleary, City Clerk."

"City of Boston, April 8th 1844. I, the subscriber, do hereby certify that Grant Learned has been duly appointed, by the mayor and aldermen, a police officer, (at the National Theatre,) with the power of a constable, except the power of serving and executing civil process, for the year ensuing. The said Grant Learned to be paid for his services by the manager of said theatre.

S. F. McCleary, City Clerk."

The defendant's counsel requested the court to instruct the jury, that Learned had no authority to retake Davis, by vir-

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tue of either of the appointments named in said certificates; but the court instructed the jury that, if they were satisfied of the facts which the evidence tended to prove, the appointments referred to in said certificates authorized Learned to make the arrest or recapture of Davis in the bar room.

The jury found the defendant guilty, and he alleged exceptions to the said instructions.

Eastman, for the defendant.

S. D. Parker, for the Commonwealth.

Shaw, C. J. The defendant was indicted in the municipal court for an assault and battery on Grant Learned, averred to be a civil officer, and obstructing him in the discharge of his duty. The defendant was convicted, and filed exceptions, upon which the case comes before this court.

1. The first exception is, that the said Learned was not an officer of the law. It appears by *St.* 1838, *c.* 123, that the mayor and aldermen of the city of Boston were authorized to appoint such police officers, for said city, as they might judge necessary, with all or any of the powers of the constables of said city, except the power of serving and executing any civil process. Under this authority, the said Learned received two appointments, both of which were in force at the time of the alleged assault. It appears that he was appointed generally, by the mayor and aldermen, as a special police officer, for the year ensuing, on the 31st of July 1843. It further appears that, on the 8th of April 1844, he was appointed a police officer, (at the National Theatre,) with the power of a constable, except the power of serving civil process, for the year ensuing; said Learned to be paid for his services by the manager of said theatre. It appears very clear that the mayor and aldermen had authority to appoint as many police officers, for the city, as they might judge necessary, and that Learned was so duly appointed. His powers are designated and limited by the statute, and include all the powers of constables as conservators of the peace.

It was insisted for the defendant, that the last appointment,

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under which Learned was acting, limited the exercise of his power to the theatre; and that this must be construed to be *within the theatre.* Whether the clause in the parenthesis (at the National Theatre) limited his power to a particular part of the city, or whether the appointment and the statute made him a police officer for the whole city, and the clause in question was intended as a direction, by the mayor and aldermen, of the place where his authority should be ordinarily exercised, (of which we give no opinion,) the exception, we think, cannot be sustained, for two reasons. *First*, that his second appointment did not supersede his first, which was still in force, and made him a police officer for the city. But *secondly*, suppose the clause (at the National Theatre) limited his power to a part of the city, we are of opinion that the defendant's construction would not be correct. The authority would not be limited to the space within the walls of the theatre, but would extend to the passages and the environs, so far as the special vigilance of an officer might be required to keep the peace and preserve order amongst those frequenting the theatre, those carrying persons to and from it, and those supplying refreshments, and also to shops, stalls and stands, kept in the vicinity, for that purpose. He, therefore, had authority to act outside of the theatre, in its vicinity, as well as within it.

2. It was contended that Learned, having permitted the disorderly person to go out of his actual custody, upon his promise to go home and be guilty of no more disorderly conduct, could not afterwards retake him. If it were true, as contended under the former exception, that the power of the officer was limited by the walls of the theatre, and that his power to arrest and retain the disorderly person arose from having first taken him within the theatre, there would be some force in the argument. This not being so, the argument fails. It has often been held that constables, as conservators of the peace, have power to arrest, upon view, persons violating the laws, and detain them until they can be brought before a magistrate. *Taylor* v. *Strong*, 3 Wend. 384. Bac Ab. Constable, C.

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We think the authority of the police officer was not gone, when he permitted his prisoner to go from him, on his promise to go directly home, and be guilty of no more disorderly conduct. His offence was that of being intoxicated, and, under the influence of intoxication, committing disorderly acts. When therefore, being still in sight of the officer, in violation of his engagement to leave the scene of disorder, he entered a bar room, where he was likely to aggravate his offence, and increase the cause of his disorderly conduct, the officer was well justified in arresting him, in order to carry him before a magistrate, whether it be regarded as a recaption for the original purpose, or a new arrest for disorderly conduct still continuing. The interference of the defendant, therefore, was unjustifiable and unlawful.

Exceptions overruled.

COMMONWEALTH *vs.* LUCEBA PARKER.

It is not a punishable offence, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child.

THE indictment against the defendant contained three counts. The first alleged that the defendant, at Boston, on the 6th of June 1843, unlawfully, knowingly and inhumanly, did force and thrust a sharp metallic instrument into the womb and body of a married woman, [named,] she, the said married woman, "being then and there pregnant with child, with a wicked and unlawful intent, of her the said Luceba, then and there to cause and procure the said" married woman "to miscarry, and prematurely bring forth the said child, with which she was then and there pregnant, as aforesaid, and that she, the said" married woman, "at said Boston, on the thirteenth day of the same month of June, by means of the said forcing and thrusting of said instrument into the womb and body of the said" married woman, "in manner aforesaid, did

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bring forth the said child, of which she was so pregnant, dead."

The second count was like the first, except in the name of the married woman therein mentioned, and the time of the alleged offence. The third count was like the first and second, except that the offence was charged to have been committed, at another time, on another married woman, who was alleged to have been "quick and pregnant."

At the trial in the municipal court, it appeared in evidence that the acts alleged in the indictment were done, by the defendant, with the consent of the women named in the first and third count. The jury found the defendant guilty on the first and third counts, and not guilty on the second. Her counsel thereupon moved in arrest of judgment on the first count, "because no indictable offence is set forth in said count, inasmuch as there is no allegation that the woman therein mentioned was quick with child, at the time the operation was performed." He also moved for a new trial on the third count, "because the verdict was against the evidence; because it was not proved that the woman in that count mentioned was quick with child, at the time the said operation was performed; and because the judge instructed the jury that it was not necessary for the government to prove that said woman was quick with child, at the time of the performance of said operation."

The judge overruled these motions; but as he deemed the questions arising thereon to be so important as to require the decision of the supreme judicial court, he made the foregoing report of the case, pursuant to the Rev. Sts. *c.* 138, § 12.

Wilmot, for the defendant.

S. D. Parker, for the Commonwealth.

Shaw, C. J. Without stating particularly the formal grounds of the motions in arrest of judgment and for a new trial, it is sufficient to say that they resolve themselves into one question, namely, whether it is an indictable offence, at common law, to administer a drug, or perform an operation upon a pregnant woman, with her consent, with the intention

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and for the purpose of causing an abortion and premature birth of the fœtus of which she is pregnant, by means of which an abortion is in fact caused, without averring and proving that, at the time of the administration of such drug, or the performance of such operation, such woman was quick with child. The instruction of the judge, at the trial, was, that it was not necessary to aver, or, if averred, to prove, this fact; and if this instruction was incorrect, a new trial ought to be awarded.

We must take care not to confound this case with some others, which resemble it in fact, but fall within another principle. The use of violence upon a woman, with an intent to procure her miscarriage, without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in case of a duel, where, in like manner, there is the consent of the parties.

The case of *Commonwealth* v. *Bangs*, 9 Mass. 387, is relied on, as a direct authority for the defendant. It is insisted upon, however, on the part of the prosecution, that that part of the opinion, which states that it must be averred and proved that the woman was quick with child, was *obiter dictum*, and not necessary to the decision.

The report is very short; and as no reasons are assigned, we cannot certainly infer whether the decision was placed upon that ground. The motion in arrest of judgment was upon two grounds; *first*, that no abortion, in fact, was produced; and *second*, that it was not alleged that the woman was quick with child; and the judgment was arrested, apparently, on both grounds. We are therefore inclined to consider it as an adjudication of the point now raised.

And the court are of opinion that, at common law, no in-

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dictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child. It was only considered by the ancient common law that the child had a separate and independent existence, when the embryo had advanced to that degree of maturity designated by the terms "quick with child," although, to many purposes, in reference to civil rights, an infant *in ventre sa mère* is regarded as a person in being. 1 Bl. Com. 129. And the ancient authorities, which speak of this crime as an offence at common law, speak of a case where the woman is quick with child. In 3 Inst. 50, Lord Coke says, "if a woman be quick with child, and, by a potion or otherwise, killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder." And to the same point are the more ancient authorities of Bracton and Fleta.

Si sit aliquis qui mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum vel animatum fuerit, et maxime si animatum, facit homicidium. Bracton, 121. To the same effect are 1 Hawk. *c.* 31, § 16, and 1 Gabbett Crim. Law, 519.

This distinction, between a woman being pregnant and being quick with child, whatever may be the physical theory upon which it was originally founded, is well known and recognized in the law. "Life," says Blackstone, "begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb." This distinction is strongly marked in *St.* 43 Geo. 3, *c.* 58, known as Lord Ellenborough's act; the first section of which declares it a capital offence to administer a drug to cause the miscarriage of any woman then being quick with child. And the same statute has another provision, declaring the same act, to procure the miscarriage of a woman not being quick with child, a felony of a mitigated character.

In the case of *Rex* v. *Phillips*, 3 Campb. 73, which was an indictment on this statute, it was held by that learned judge, Mr. Justice Lawrence, that, in the construction of this statute, the words "quick with child" must be taken to be accord-

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ing to the common understanding, which was proved to be this; that a woman is not considered to be quick with child, till she has herself felt the child alive and quick within her. It is not necessary, however, to decide, in the present case, what degree of advancement in a state of gestation would justify the application of this description to a pregnant woman; because, in this case, it was not alleged, and the court ruled that it was not necessary to prove, that she was quick with child.

The only authority, adduced in support of the prosecution, was a precedent in 3 Chit. Crim. Law, 798, which is an indictment at common law, in which it is not alleged that the woman was quick with child. It does not appear that any judgment was rendered on this indictment, which was found shortly before the passing of the act of 43 Geo. 3; but as it is inserted, as a precedent, in a work of good authority, it was probably deemed good evidence of the law. But, upon a careful consideration of this precedent, it will not be found inconsistent with what we take to be the rule of the common law. The indictment contains several counts, and they all charge an assault upon the woman; and there is no intimation that the applications were made with her consent, but the conclusion, from the averments, is otherwise. It is then the case of an assault at common law, with aggravations. But what is more material is, that, although the woman was not alleged to be quick with child, yet it is averred that she was pregnant and big with child, and that the act was done by the defendant wilfully, and with intent feloniously, wilfully, and of his malice aforethought, to kill and murder the child with which she was so big and pregnant. And in other counts, it is laid that drugs were administered to her, she being pregnant with another child, and with intent to cause and procure her to miscarry and bring forth said child dead, &c. The whole proceeds on the averment, that she was then pregnant with a child, then so far advanced as to be regarded in law as having a separate existence, a life capable of being destroyed; which is equivalent to the averment that she was quick with child. See 15 Pick. 256.

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There being no averment, in the first count in this indictment, that the woman was quick with child, or any equivalent averment, and the judge, who tried the case, having instructed the jury that it was not necessary to prove such averment in the third count, the court are all of opinion that, although the acts set forth are, in a high degree, offensive to good morals and injurious to society, yet they are not punishable at common law, and that this indictment cannot be sustained.*

Commonwealth vs. Rufus B. Bradford

a party who is indicted on the Rev. Sts. c. 4, § 6, for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, admits, on his trial, that he voted at the election, it is equivalent to an admission that he voted wilfully.

On the trial of a party indicted for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, when the only question is, whether he had resided in the town where he voted six months next preceding the election, evidence that he had resided in another town until within seven months of the election does not put upon him the burden of showing that he had changed his residence, but the burden of proof to support the indictment remains on the Commonwealth.

Evidence that a party consulted counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right, is admissible in his favor, on the trial of an indictment against him for wilfully voting, knowing himself not to be a qualified voter, but is not conclusive evidence that he did not know that he was not a qualified voter

The defendant was indicted for voting in the city of Boston, at the general election, on the 11th of November 1844; and the indictment alleged that he was not, then and there, a legal and qualified voter, and that he had not, before the said election on the day aforesaid, resided in the Commonwealth one year, and within said city six months next preceding said day; and that he, then and there, knowing himself not to be a qualified voter at said election, did, in ward number five of said city, wilfully give in a vote for the officers then to be chosen.

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* By St. 1845, c. 27, provision is made for the punishment of the offence with which the defendant was charged in this case.

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The defendant was tried and found guilty in the municipal court, and the case came into this court on the following bill of exceptions: "It was admitted by the defendant that he voted in ward five, on said 11th of November, and the only question was that of his domicil. There was evidence tending to prove that the defendant had resided, for many years, in Kingston in this State, and was a resident there until on or about the 1st of April 1844, when he came to Boston, and entered into partnership and business, with the express understanding that he should make that place his residence; that he continued in Boston, from said 1st of April till the day of the election, with occasional returns to Kingston, where his family remained till a short time previous to the election, when they came to Boston, where they have since resided. There was also evidence tending to show that the defendant's family were sick and unable to be removed, until about the time when they came to Boston; and there was conflicting evidence as to the defendant's intentions and declarations respecting his domicil.

"It was also in evidence that the defendant's name was on the voting list of said ward, and that, on the day he voted, and previously to voting, he had taken legal advice of several counsel, and was advised that he had a right to vote; and there was further evidence to show that he intended, at the time of his removal, and afterwards, to vote in Boston, provided he had a legal right so to do.

"On this evidence, the presiding judge instructed the jury as follows: 1st. That the admission of the defendant, that he did vote at the election in question, was equivalent to an admission that he did 'wilfully,' that is, designedly, vote therein. 2d. But it being apparent, by the testimony on both sides, that the defendant's domicil was in Kingston, until he acquired one in the city of Boston, the burden of proof was upon the defendant to satisfy the jury, affirmatively and beyond a reasonable doubt, that, on the 11th day of May 1844, he had changed his domicil from Kingston to Boston, and there dwelt, and had his home in that city. 3d. But the

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fact, that the defendant had consulted counsel, with reference to his right to vote, and had received an affirmative answer, could not be regarded as negativing a knowledge, on his part, of his want of the legal qualification to vote."

C. G. Davis, for the defendant.

S. D. Parker, for the Commonwealth.

SHAW, C. J. This indictment is founded on the Rev. Sts c. 4, § 6, which provide that, "if any person, knowing himself not to be a qualified voter, shall, at any election, wilfully give in a vote for any officers to be then chosen, he shall forfeit a sum not exceeding $100, for each offence."

Several exceptions were taken to the decisions of the municipal court, upon which the cause has been brought here.

1st. That the admission, that the defendant voted at the election, was sufficient to support the averment that he voted wilfully. It appears, by the bill of exceptions, that it was admitted by the defendant that he did vote, in the fifth ward, at the election and on the occasion stated; his name being on the voting list.

Considering the manner in which the word "wilfully" is used in the statute, the court are of opinion that this was right. It may sometimes mean corruptly or unlawfully; but in this section, where the gist of the offence consists in the other clause, "knowing himself not to be a legal voter," the term "wilfully" means designedly, purposely, with an intent to claim and exercise the right of suffrage, on that occasion, in common with the legal voters of the city.

2. The question was, whether the defendant had resided six months in the city, when he thus voted; being one of the necessary constitutional qualifications. It was admitted, or proved, that he had had his domicil in Kingston, in this State, till about the 1st of April preceding, and the question was, whether he had acquired a domicil in Boston, at or before the 11th of May last, being six months before the election. It being proved that his domicil was thus at Kingston, the court instructed the jury, that the burden of proof was on the defendant, to satisfy them, affirmatively and beyond a reason-

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able doubt, that, on the 11th of May last, he had changed his domicil from Kingston to Boston, and there dwelt, and had his home in that city.

The court are of opinion that this direction was wrong, and that the burden of proof was still on the government, to prove that the defendant had no right to vote, and that he had not been an inhabitant of the city six months. This, it is true, is a negative proposition, difficult to prove, but necessary, in order to charge a party with a criminal offence. But there are some rules applicable to such a case, which, in some measure, relieve this difficulty. If slight evidence be given of the negative proposition, and the fact be of such a nature that it would be obviously in the power of the other party to give full and ample proof on the subject, and he gives none, the slight evidence would become strong and cogent proof of the negative. If, for instance, a person should present himself as a voter and an inhabitant, and some evidence be given that he has not been known or seen here, till a recent period; proof that he first came to a lodging within the city, within a few days or weeks previous to the election; that he was not before known to those persons who would be likely to know all resident inhabitants — such as police officers, tax collectors, persons employed to collect names for a directory, and the like — and he should offer no proof on the subject, such proof being manifestly within his power; it would be strong evidence, in support of the negative to be proved, that he had not been a resident inhabitant. Some maxims, too, on the subject of domicil, are to be taken into consideration, and probably were regarded, by the learned judge, as sufficient to change the burden of proof. These are, that a person can have but one domicil at one time; that he must have a domicil somewhere; and that one domicil continues until another is acquired.

That the defendant had been domiciled at Kingston, until a recent period, was a material fact, and, combined with other slight proof — such as that his family continued at Kingston, that his residence at Boston was casual, temporary, and for a

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special purpose — especially if the defendant should offer no evidence, would all be proper and competent evidence to a jury, from which, if uncontrolled, they might infer that his domicil was at Kingston, and of course not in Boston, where he voted. But after all the evidence on both sides, bearing upon the question, has been submitted to the jury, to be considered in connexion with the maxims, rules and presumptions, in regard to domicil, it is for the jury to be satisfied, on the whole evidence, in order to warrant a conviction, that the defendant had not had his home in Boston six months; and they should have been so instructed.

3. One other exception was taken. The judge directed that the fact that the defendant had consulted counsel, with reference to his right to vote, and had received an affirmative answer, could not be regarded as negativing a knowledge, on his part, of his want of the legal qualification to vote.

In order to convict a party, under this statute, which is extremely liberal in this respect, it is necessary to prove, not only that the party had no right to vote, but that he knew it. As this qualification depends upon domicil, and that is often a complicated question of law and fact, we have no doubt, that if the voter, in good faith, and with an honest purpose to ascertain the right, shall make a true statement of the facts of his case to a professional man, or any other man of skill and experience, capable of advising him correctly, the evidence of such advice, and the facts upon which it was taken, are competent, as bearing upon the question whether he knew that he had not a right to vote. For although the jury, with the aid of all the evidence laid before them, with the lights thrown upon it by an exposition of the rules of law, may be satisfied that he had not the qualification of residence, and of course had not a right to vote, yet they may also be satisfied that he did not know that he was not a legal voter; and the means he took to inform himself have a direct bearing upon this last question. The direction of the court upon this point was, that the fact that the defendant had consulted counsel as to his right to vote, and received an affirmative

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answer, could not be regarded as negativing a knowledge, on his part, of his want of the legal qualification to vote.

This language is not perfectly clear, and we have had some little difference of opinion as to its true meaning. If the judge intended to say that it had no tendency to negative such knowledge, we think it was incorrect. But if, as it seems more probable from the language and the circumstances, the judge intended to say that this evidence was not conclusive — was not sufficient of itself to negative such knowledge, if controlled by other satisfactory proof — we think it was correct. But on the ground of the second exception, the court are of opinion, and do order, that the verdict be set aside and a new trial had at the bar of this court.

Commonwealth *vs.* Pardon Williams.

A memorandum book, kept by a person who works for a tailor by the piece, and in which entries are made of the names of the persons owning the garments worked upon, and the prices of the work, is a "book of accounts for or concerning money or goods due, or to become due, or to be delivered," within the Rev. Sts. c. 126, § 17, and is the subject of larceny. And such book, given by a tailor to the person who works for him, for the purpose of such entries being made therein, is the property of such person, and not of the tailor.

A certificate, given to A. by B., whom C. had promised to pay for work, stating that A. has paid for the work, and that B. has no claim therefor on C., is a "receipt or release," within the Rev. Sts. c. 126, § 17, and is the subject of larceny.

The indictment against the defendant alleged that he, at Boston, on the 23d of April 1844, "one certain original book of accounts concerning money due, of the value of twenty dollars, one receipt, release or defeasance, containing an acquittance of money due, of the value of six dollars, and sundry bank bills, amounting together to the sum of eleven dollars, and of the value of eleven dollars, of the goods and chattels of one Alida M. Rholl, in the dwelling-house of one Susan H. Danforth, there situate, in her the said Alida's possession then and there being, did then and there, in said dwelling-house, in the day time, feloniously steal, take and carry away."

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The trial was in the municipal court, and the following report thereof was made by the presiding judge: "It appeared in evidence that the defendant was a tailor, having in his employment, among other females, Alida M. Rholl; that he gave to each of his work-women a small paper memorandum book; that the book given by him to said Alida, and in which he wrote her name, (and which is a part of the case,) contained entries of work done for other persons besides the defendant; but no names appeared, to designate for whom the work was done; and all but the last seven charges, on said book, of garments received from the defendant, had been settled and paid. The said Alida had declined to work on the last two of said garments, unless Pierce & Nichols, who had furnished the garments to the defendant, would agree to pay her. This was agreed, and said Alida had finished the two garments, and returned them to the defendant on the 20th of April 1844. On that evening, (Saturday,) said Alida went to the defendant's shop door, and asked for a settlement; and the defendant then paid her, as she alleged, three dollars on account; and the book, above referred to, was left by her, and suffered to remain in the defendant's hands. On the next Tuesday, April 23d, the defendant, finding that Pierce & Nichols would not settle with him, unless they were relieved from their promise to said Alida, went to her house, and took the said book with him, and asked her to insert the said two garments in the book and to give him a certificate to Pierce & Nichols. At first she refused; but upon his saying that he would not settle with her till she did, she said, if he would settle with her, it did not matter much which paid her; and she then inserted in the book, as follows: 'Stoddard, $3·37: Trundy, $2·45.' The defendant then wrote the following certificate, which said Alida signed: 'This is to certify that I have no claim on George N. Nichols for Mr. Stoddard and Trundy's coats, as P. Williams has settled with me for all on my book.' The defendant had seated himself at a table, and had before him, lying on the table, the said book, the said certificate, and his wallet, from

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which he had taken some bank bills, which also lay by the side of the wallet. He then said he could 'not fix it any way,' unless she could give him eighty three cents in change, and asked if she had it, or could borrow it in the house. She went up stairs to borrow it, and on her return with it, the defendant had gone with the book, the certificate and the money.

"The court ruled, upon the facts so appearing, *first*, that the bank bills had not passed from the possession of the defendant to said Alida, or become her property; and therefore he had a right to take and remove them. *Second*, that the book was a book of accounts concerning money due, within the meaning of the Rev. Sts. *c.* 126, § 17, and was therefore a subject of larceny. *Third*, that the property in the book and certificate were in said Alida, at the time the defendant took them away, and that, if they were taken feloniously, the defendant might be found guilty of stealing both.

"The verdict of the jury was, 'that the defendant is guilty of simple larceny of the original book of accounts concerning money due, and of one receipt, release or defeasance, containing an acquittance of money due, of the value of seventeen dollars and seventeen cents, mentioned in the indictment; but not guilty of the residue of the indictment.'"

To these several rulings the defendant alleged exceptions.

Park, for the defendant.

S. D. Parker, for the Commonwealth.

Shaw, C. J. On exceptions from the municipal court, the case appears to be this: The defendant was indicted for larceny, in stealing one book of accounts concerning money due, one receipt, release or defeasance, and a sum of money. The jury acquitted him of stealing the money, and convicted him of stealing the book of accounts and receipt.

The defendant is a tailor, who employs women to work by the piece; and the custom is to give to each a small manuscript book, in which the various pieces of each are entered, generally under the names of the persons for whom they are made, with the prices annexed. Such a book had been given

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to Alida M. Rholl, and her name written therein by the defendant.

The first exception is, that this was not a "book of accounts," within the meaning of the statute, (Rev. Sts. c. 126, § 17,) so as to be the subject of larceny. The principal argument in support of this exception is, that this is not a book of original entries, which would be evidence for the owner, with the aid of his own oath, in support of an action in his own name. But the court are of opinion that this exception cannot be sustained. The words of the statute are, "any book of accounts for or concerning money or goods due, or to become due, or to be delivered." The book fully satisfies this description. It concerns money due, and goods to be delivered. Connected with other facts, it might be used as legal evidence. The statute does not confine the description to books of original entries. It may be a great injury to a person to steal the books containing the statements of his accounts with others, though not evidence as a book of original entries. It may be valuable for his own information.

Nor is there any ground, on this evidence to say that the book was not her property. The same evidence which shows that the defendant ever owned it shows that he gave it to her. The gift and actual delivery of it to her made it her property. Nor did the return of the book to him, on Saturday, divest her property. It was a temporary surrender of the possession for a special purpose. But it was restored to her possession, and she had made additional entries in it, before the alleged felonious taking; so that it was then her property and taken from her possession.

The second exception is, that the receipt or release was not the subject of larceny. The bill of exceptions shows that she had declined making the two last articles, amounting to $5 82, unless Pierce & Nichols, by whom the defendant himself was employed, would pay her; and this they agreed to do. They were then her debtors, as sureties for the defendant. The certificate which he had required to be given to him on payment, and which he took without payment, was,

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in terms, a discharge to them, which he wanted for the express purpose of obtaining the money from them, which he could not obtain without. It comes directly within the description of a receipt or release. It is an acknowledgment of having received payment of the defendant, and a discharge of her claim on Pierce & Nichols. It also purported that she had received payment of the defendant, and was therefore, in form, a discharge to him.

The third exception is, that the court charged the jury, that the defendant, on the evidence, might be found guilty of stealing both the book and the receipt; that they did so find, and found the aggregate value to be $17·17. It appears to us that this is answered by a reference to the facts proved. The evidence shows that there was due to Alida M. Rholl, on Saturday, when she went for a settlement, $20·17, including the two articles, not then entered on the book, for which she held Pierce & Nichols responsible; and the defendant then paid her $3. There was then due to her, on Tuesday, when the book and receipt were taken, $17·17. The book and receipt were both her property; they were to be delivered to him on paying the money, which had not been paid; and of course they both remained her property when they were taken, and both together were evidence of a debt due to her of $17·17. We can, therefore, perceive no mistake in the direction, nor in the finding of the jury upon it.

Exceptions overruled.

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Alfred E. Goodwin *vs.* William H. Morse.

A promissory note may be given in evidence, on the money counts, in a suit by an indorsee against the promisor.

When a promissory note, given for a chattel that is warranted to the promisor by the payee, is indorsed after it is dishonored, and the indorsee sues the promisor on the money counts, and gives the note in evidence, the promisor may show that the chattel was not such as it was warranted to be; and he is thereupon entitled to have so much deducted from the amount of the note, as the chattel, by reason of its defects, was worth less than it would have been, if the defects had not existed; but he is not entitled to a deduction of the difference between the amount of the note and the sum which the jury may deem the true value of the chattel.

Assumpsit on the money counts only. At the trial, in the court of common pleas, before *Warren*, J., the plaintiff offered in evidence a promissory note, for $110, signed by the defendant, dated July 26th 1841, payable to Goodwin, Sargent & Co., or order, on demand, without interest, and indorsed by the payees. The defendant objected to the admission of the note in support of the declaration; but the objection was overruled.

It was admitted by the plaintiff that the note was given to the payees in part payment of the price of a chaise bought of them by the defendant at the date of the note, and that the chaise, at the time of the sale thereof to the defendant, was warranted by them to be "a first rate chaise;" and that the note came into the hands of the plaintiff when it was overdue.

The defendant then offered evidence tending to show that said chaise, at the time of the sale thereof, was not a first rate chaise, but that there were defects in it; and he claimed a deduction from the amount of the note, on that account. He also contended that the difference between the amount agreed to be paid for the chaise, and what the jury should deem its true value at the time of the sale, was the amount of the deduction to which he was entitled. But the judge instructed the jury, that if the chaise was sold with warranty, and if there were, at the time of the sale, defects in it which constituted a breach of the warranty, the defendant was entitled to have so much deducted from the amount of the note as the chaise was worth less on account of such defects.

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The jury returned a verdict for the plaintiff, for a part of the amount of the note; and the defendant alleged exceptions to the aforesaid ruling and instructions.

Wellington, for the defendant.

Brigham, for the plaintiff.

Shaw, C. J. It is too late now to question the proposition, that on the counts for money had and received, and money paid, a note may be given in evidence in a suit by an indorsee against the maker. It is evidence of money received by the maker, to the use of any one who shall become the lawful holder by indorsement. *State Bank* v. *Hurd*, 12 Mass. 172. *Penn* v. *Flack*, 3 Gill & Johns. 369. *Raborg* v. *Peyton*, 2 Wheat. 385. *Olcott* v. *Rathbone*, 5 Wend. 495.

On the other point, we think the direction of the court of common pleas was right. The plaintiff, suing upon an overdue and dishonored note, may be met by any set-off, or other equitable defence, which would avail against the payee. If he chaise, for which this note was the consideration, did not conform to the warranty, the purchaser, in a suit on his note by the vendors, might have a deduction, for the breach of warranty, from the note. *Harrington* v. *Stratton*, 22 Pick. 510. But what would he have a right to deduct? The defendant insists that it is the difference between the amount agreed to be paid for the chaise, that is, the amount of the note, and what the jury should deem to have been the true value of the chaise at the time. But the judge declined to adopt this rule, and instructed the jury, that if there were defects in the chaise, amounting to a breach of warranty, they should deduct as much as the chaise was worth less on account of those defects.

The court are of opinion, that the claim of the defendant could not be supported, and that the direction to the jury was right.

There was no question before the jury as to the actual worth of the chaise; no question whether either party had made a good or a bad bargain. This mode of defence is of modern origin, founded on a liberal application of the rules of law, which allow such deduction as a substitute for a cross

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action on the warranty, to avoid circuity of action. The same rule of damages, therefore, must be adopted, as would be adopted in assessing damages in such cross action. In that case, it is very clear that the rule of damages would be the loss arising from those defects in respect to which the warranty is broken.

Exceptions overruled.

WILLIAM R. P. WASHBURN *vs.* SAMUEL E. SEWALL & others.

A bequest, for charitable uses, to an unincorporated female society in another State, composed in part of married women, is valid; and a court of equity will appoint a trustee to receive the bequest, in trust for such charities as are administered by such society.

THIS was a bill in equity, brought by the executor of the will of Margaret Tucker, to obtain the direction of the court in the execution of his duties, in several particulars, under said will. Some of the questions arising in the case were decided at a former term. See 4 Met. 63. The question now presented to the court arose upon the following clause in said will: "I further give and bequeath to Mr. and Mrs. Meserve the income of one thousand dollars, during their joint lives, to be paid to them, or either of them, annually, by my said executor, and, after the death of either of them, to the survivor, during his or her life; and after the decease of both of them, it is my will, and I do accordingly order and direct, that my said executor pay over the principal to the Concord Female Charitable Society in New Hampshire, to which the same is hereby given and bequeathed."

The plaintiff alleged, in his bill, that he had no personal knowledge as to said society; that he had been informed that no society of that name had been incorporated, in New Hampshire, at the time of the decease of the testatrix; but that a number of women had formed a society, at said Concord, called by that name. He therefore submitted to the court the question, "whether said society is or is not entitled

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to receive said legacy, or the principal thereof, on the death of Mr. and Mrs. Meserve, and what the rights of said society, or the individual members thereof, are, or his duty is, in relation thereto."

It appeared that no decision was made on this question, at the time of a prior decretal order, and that no answer was put in, by said society, prior to the former hearing; and that the case had been continued to the present term, in order that the claim of the society might be considered at a proper time.

At the present term, the answer of the Concord Female Charitable Society was filed, signed and sworn to by the president, vice president, secretary, treasurer, and ten of the twelve directors, and Joseph Low, trustee of the society. The answer stated that Mr. and Mrs. Meserve, mentioned in said will, were Nathaniel Meserve of Concord, New Hampshire, and Hannah, his wife; that he died on the 3d of November 1839, and she on the 10th of March 1844; that said society is a voluntary society, composed of women in said Concord, now numbering nearly one hundred; that it was formed on the 9th of January 1812, and has since continued in constant and successful operation; that its objects are strictly charitable, to wit, providing groceries for the sick and infirm, clothing and fuel for the helpless and needy, &c.; that said society, at a meeting held December 3d 1844, unanimously voted to appoint Joseph Low trustee of said society, for the purpose of receiving, in trust, the fund bequeathed to them by said Margaret Tucker, and that he had accepted said appointment. Wherefore the said society prayed the court to decree that the said Washburn should pay to the said Low, in trust for the society, the legacy of $1000, with interest since the last payment of interest thereon to said Hannah Meserve.

The case was set down for a hearing on the bill and answer; it being admitted, by the defendants, that some of the members of said Concord Female Charitable Society were married women at the time of the making of said will, the death of the testatrix, and the present time; and that some of the

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directors of said society, who signed the answer, are married women.

No argument was submitted to the court.

SHAW, C. J. It is very clear that the bequest, made in the will of Margaret Tucker, to the Concord Female Charitable Society, although there was no such society incorporated, will still be good and available as a charitable donation. *Burbank* v. *Whitney*, 24 Pick. 146. *Bartlett* v. *Nye*, 4 Met. 378. It has been frequently held that the *St.* 43 Eliz. *c.* 4, in regard to gifts to charitable uses, is in force in this Commonwealth. *Bartlet* v. *King*, 12 Mass. 537. *Going* v. *Emery*, 16 Pick. 107. *Sanderson* v. *White*, 18 Pick. 328.

In cases of charitable gifts, it is no objection to their validity, that no person is named, capable of taking the legal interest. If the object can be ascertained, the want of a trustee will be supplied by appointment by a court of equity. *Mills* v. *Farmer*, 1 Meriv. 55. In the present case it appears that the species of charity intended by the testatrix is clearly designated. It is that which is administered by a well known association of women, not incorporated indeed, but who are distinctly marked out and identified, under the description of the Concord Female Charitable Society in New Hampshire. The court will, therefore, appoint a suitable person, as a trustee, to take and receive this donation, and hold the same, in trust, for such charities as are administered by said voluntary society of women, designated by said will.

LAWSON KINGSBURY & others *vs.* JOHN A. GOULD, Executor.

A testator directed, by his will, that his son and his son's wife should be maintained by his executor, out of his estate, and that their children should also be so maintained, until they should come of age: He further directed, that his estate, real and personal, should be kept by his executor, as a fund for the purpose of paying all the legacies given by his will, and for maintaining the persons aforesaid, and that, after such directions should be complied with, the residue of his estate, if any, should be divided among his grandchildren. *Held*, that both the real and personal estate of the testator vested in his executor upon the same trusts.

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Kingsbury & others v. Gould, Executor.

A testator, leaving $30,000, and an only child, a son, who had several minor children, devised to his son's wife the use of one half of a house in which she lived, and one half of the furniture therein: He also directed his executor to maintain, out of his estate, his son and his son's wife, during life, taking their several receipts for the same, and also to maintain their children, until they should respectively come of age: The said house was small, uncomfortable and unsuitable for the son's family. *Held*, that the executor was authorized, and that it was his duty, to hire a house suitable for said family, if one could be hired, for five or seven years, in the town where said family resided; and that, if such house could not be there so hired, he was authorized, and it was his duty, to erect a house, in said town, suitable for said family, and to purchase furniture suitable therefor.

This was a bill in equity brought by Lawson Kingsbury and his wife, and their eight children, seven of whom were minors. The bill alleged that Asa Kingsbury, late of Walpole, in the county of Norfolk, father of said Lawson, died on the 12th of August 1840, leaving a last will, which was duly proved and allowed, of which the defendant was appointed executor, and accepted the trust, and which contained (among other things) the following clauses: "*Item.* I give and bequeath to Lawson Kingsbury, my son, ten dollars, to be paid immediately after my decease. It is further my will, that he be prudently maintained by my executor, out of my estate, during his natural life; my executor taking said Lawson's own receipt for the same, so that he may receive it free from all control of his creditors. *Item.* I give and bequeath to Sophia, wife of the before named Lawson, ten dollars, to be paid immediately after my decease. Also the use and improvement of one half of the house and land where she now lives, and one half of the furniture in said house. The furniture and house to be held for her by my executor to this my will. And it is further my will, that she be maintained by my executor, out of my estate, so long as she shall remain the wife or widow of the before named Lawson; my executor taking her own receipt for the same, so that she may receive the same free from all control of her husband, or of his creditors. *Item.* It is also my will that the eight children, which the before named Lawson and Sophia now have, be prudently maintained by my executor, out of my estate, until they arrive at full age; and that they may have a common school

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education, and be brought up to habits of industry and morality. And it is further my will, that my executor pay, out of my estate, to the children of the before named Lawson and Sophia, as follows: To the four sons" (naming them) "the sum of five thousand dollars each, when they become of full age; allowing them the privilege, if they may see cause, to let the whole or a part of said sum remain in the hands of my executor, and receive interest on the same. To the four daughters" (naming them) "the sum of two thousand dollars each, when they become of full age, allowing each of them the privilege," &c. (as in case of the sons.) "*Item.* It is my will, that the remainder of my estate, both real and personal, which I may die possessed of, should be kept as a fund, by my executor or his successors in that office, for the purpose of paying all the before named legacies, as they become due, and for supporting and maintaining the several persons, as before directed in this my will and testament. And if any thing shall remain of my estate, real or personal, after complying with all the above named provisions, and paying all my just debts, and all funeral expenses, and my executor or his successors in that office for their services," &c., "it is my will to give the said remaining estate to such of my before named eight grandchildren as may at such time be living, to be divided among them, in such manner that each grandson shall have double the amount which each granddaughter may receive. If any of the before named grandchildren shall be dead at the time of such division, and have issue then living, such issue shall be entitled to the part that their parents would have been entitled to if then living; to all and each of the persons who may receive the property, to them, their heirs and assigns forever."

The bill averred that the property, bequeathed as above, was about $80,000, and that the income thereof was sufficient (after deducting the sums to be paid to the aforesaid eight children on their coming of age) to meet all the expenses of said Lawson's family, and all the charges to which said estate was liable, and leave a surplus, annually, to be added

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to the principal: That the dwelling-house, occupied by the plaintiffs, was small, inconvenient, uncomfortable and unsuitable for the said family, and must necessarily be abandoned, if the plaintiffs remain together as a family; and that no better use could be made of their large estate, than that of providing for them a suitable dwelling: That they had applied to the defendant, to appropriate out of the estate of said Asa, the testator, devised and bequeathed to them, as aforesaid, a sum sufficient to erect, upon the land of said testator, devised to them as aforesaid, a suitable dwelling-house and other buildings, to remain a part of said estate, to be distributed according to the provisions of said will; but that the defendant, denying that he has authority so to do, declines to grant to the plaintiffs any relief in the premises.

The prayer of the bill was, that the defendant might be authorized and ordered to appropriate, out of said estate, a sum not exceeding $10,000, for the purpose of erecting a suitable dwelling-house for the plaintiffs, and a further sum, not exceeding $2000, for the purpose of purchasing furniture for their use and accommodation.

The defendant, in his *answer*, admitted most of the facts alleged in the bill, but did not admit that the income of the said testator's estate, after deducting the legacies to be paid to said Lawson's children when they shall come of age, would be sufficient to meet all the expenses of said family, and leave a surplus, annually, to be added to the principal. He also submitted to the court, whether it did or did not appear, from the said will, that the testator intended that said Lawson's family should continue to occupy the house mentioned in said will, during the life of the said Sophia. He stated that he did not deem himself authorized, by said will, to make the appropriation demanded by the plaintiffs; that he believed that such an investment would not be a prudent and proper mode of providing a dwelling-house for them, and that he had therefore declined to comply with their request; but that he had offered to hire a suitable dwelling-house for their accommodation. or to allow them a sum of money sufficient to hire such

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house for themselves. But he declared himself ready and willing to do whatever the court should think fit in the premises, and prayed for that just protection which should be granted, by a court of equity, to a trustee acting in good faith.

A replication was filed by the plaintiffs, and evidence was taken, which is referred to in the opinion of the court.

Fletcher & B. Sumner, for the plaintiffs.

B. R. Curtis & Cleveland, for the defendant.

Shaw, C. J. The personal property of the testator was undoubtedly vested in the executor, to be held upon the trusts declared in the will. And though the legal estate in fee is not devised to the executor, in terms, yet no question, on that point, was suggested at the argument; and we therefore are of opinion, that both the real and personal estate vested in the executor, upon the same trusts, to go to the same persons, and in the same proportions.

1. On the first ground suggested in the bill, the court are of opinion that the bill cannot be sustained upon that part of the trust, declared in the will, which directs the investment of the trust fund. So far as security and productiveness are concerned, there is no suggestion that it is not well invested. The court would be slow to interfere to control the discretion of the trustee on this subject, and would do so only in a case where it should be made apparent that the actual or proposed investment would put the fund at hazard, or otherwise threaten a great loss to the beneficiaries.

2. If the bill can be sustained at all, it must be on the trust to maintain the complainants. The phraseology of the testator, in his will, is this: In regard to his son, "that he be prudently maintained;" as to his son's wife, "that she be maintained;" and as to the eight children, that they "be prudently maintained by my executor, out of my estate, until they arrive at full age."

Maintenance is a term of somewhat large import, and must be construed in reference to the subject. Taking the amount of the estate, and the relations of the parties, we think it was

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not intended, in this will, to be confined to a bare subsistence; such amount as would be sufficient to board them singly. These parties were all to be maintained; the parents for their lives, and the children whilst under age. The parents were still to have the care, custody and education of their minor children, and the children were still entitled to the protection and comfort to be derived from their parents. It is a reasonable construction of the provision, that it was intended that they should live together in the enjoyment of family relations, and the rights and duties arising therefrom. Had such provision been made for the maintenance of a single person, of either sex, of mature age, it might reasonably have a different construction.

Supposing, then, that it is a just and equitable construction of this trust, that this family are to be maintained together, at least whilst a majority of the children remain under age, the question is, whether it is within the power of the trustee, and if so, whether it is a proper and just fulfilment of that trust, to provide for them a dwelling-house.

We are aware that it is a rule in equity, that under a trust for maintenance, the court will not, in general, authorize the application of capital to maintenance, unless when it is quite small, and the occasion urgent; but it cannot have much application to a case like this. It is not here proposed to *expend* any portion of the capital for maintenance, but to place a portion of the capital, subject to the same trusts as before, in such a situation, that those who, as a family, are entitled to maintenance, may have the specific use and occupation of it, instead of its being placed in such a situation as to yield income, and that income to be so applied.

The clause, directing the separate receipt of the husband and of the wife, respectively, to be taken, is relied upon to show the understanding of the testator that this provision for maintenance would be paid in money. As it might all be paid in money, and as part of it would, probably, be so paid, such a provision was proper, to effect the object of the testator, which obviously was, as to the husband, to exclude cred-

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itors, and as to the wife, to make it independent of the husband. But it carries no implication that the whole must be paid in money, and therefore does not exclude the inference of an intention, on the part of the testator, that the son, and his wife and family, might have the use of a part of the trust property, as incident to part of the provision for their maintenance.

One mode of testing the question would be this: Suppose the father, leaving an only son and child, (as in the present case,) with a family, had left a suitable and convenient dwelling-house — his own mansion house, or any other — would it not have been a good execution of the trust, especially during the minority of most of the children, to permit the son, with his children, to occupy such house, as a part of the provision for maintenance? We think it would.

As to providing a house when the trust estate does not supply one, there are certainly some objections to it. It would be, in the first instance, a means of providing maintenance for the parents and seven of the children only, and for them whilst they continue to be minors; but the children are successively to come of age, when the provision for their maintenance, respectively, will cease, whilst the investment in the house will remain the same. Although this is an objection to this specific mode of providing maintenance, we think it is not decisive. Taking the ordinary chances of life, the parents are likely to survive a considerable number of years, and whilst they live, they will need a dwelling-house for themselves; and although the children, after coming of age, will not be entitled, in strict right, to the use of the house, as part of their maintenance, yet it is among the reasonable wants of such parents, to be able to afford hospitality, at their own house, to their emancipated children.

But we do think there is so much weight in this objection, that it should deter the trustee from building a house, if a suitable one can be hired for a considerable number of years, say five or seven years; and it should also deter him from building a house so large or expensive, that it would not

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readily sell, at nearly the cost, after a suitable deduction for wear and decay; or that would not let at a rent which would be a fair income on the investment, or as nearly so as houses, in a similar situation, will usually sell or let. By keeping within these limits, the trust estate will not be essentially diminished. As Framingham is the place where the family resided during the testator's life time, and have continued to reside since, and, as appears by the evidence, is altogether a suitable and convenient place for the residence of such a family, having regard to schools and the means of education, we think it is within the authority of the trustee, and his duty, in that capacity, to procure a suitable house in Framingham, of a style such as would render it a suitable investment of capital in that town, so that, after it should cease to be used for the family, it might remain part of the trust property, for the purpose of being let or sold. But this would exclude a house of elaborate and expensive finish and high cost, not likely to be sold or let, in that place, for a price reasonably proportioned to the cost. We should be inclined to think, from the evidence adduced, that such a house might be erected at a cost somewhere from three to five thousand dollars.

But we think that such investment is not necessary, if a suitable house can be hired, at a fair rent, for *five or seven years*; and if a house is necessary to be built, it is not for the court to prescribe the details, that may be properly referred to a master.

It may also be matter of doubt, on the evidence, whether the lot described in the bill would be suitable for the purpose, and whether it would be expedient to build thereon.

We think, therefore, it is proper to refer it to a master, to inquire and report, *first*, whether a suitable house in the town of Framingham can be hired, for a term of time, at a reasonable rent, suitable for the residence of such a family; if not, *secondly*, what would be the cost of a house in that town, suitable for such a family, and which, within the principles above stated, would be a reasonably fair investment of the property,

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having regard to the future sale of the house, or to the rent which would be likely to be obtained for it; *thirdly*, whether it would be expedient, having regard both to the title and to the economy of building, to erect a house on the lot described in the bill, or whether a more suitable and eligible lot can be purchased, at a reasonable cost, in Framingham, and how the title should be taken, so as to make it a part of the estate, liable to, and bound by, all the provisions and trusts of the will.

As to an investment in furniture, we are of opinion that the same reasons apply; and that it is within the power, and is the duty, of the executor and trustee to appropriate from the trust fund a sum sufficient to furnish the said house, when hired or erected, in a suitable manner. One reason for this, in addition to the grounds stated, is this: This house is to be, in part, for the maintenance of the wife and minor children, which it could not be, if not furnished. Now, if by way of a provision for maintenance, the trustee should furnish Lawson Kingsbury with money to purchase furniture — which seems the only alternative — it would, when purchased, be his property and liable to be taken for his debts; contrary to the plain intention of the will. But if a suitable amount be invested by the executor and trustee, in his own name, as such, it will remain his property; by means of which, all the beneficiaries, the wife and children as well as Lawson Kingsbury himself, will specifically enjoy the benefit of it, as trust property. And though it may be diminished in value by use, and if the trust last long enough, may wear out, yet such gradual diminution will stand in the place of the expenditure of money for the same purpose, and will relieve the residue of the trust fund to the like extent.

We think, therefore, it may be referred to the master, to inquire and report what amount it may be necessary to expend for the furniture of said house, when ready for occupation.

All other directions are reserved till the coming in of the report.

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Harlous Whiting *vs.* Henry D. Gray.

Under *St.* 1838, *c.* 163, § 4, an appeal from a decision of a judge of probate or master in chancery, rejecting a claim against the estate of an insolvent debtor, cannot be taken to the supreme judicial court, unless the debt demanded exceeds the sum of $300 on the day of the first publication of notice, by the messenger, that a warrant has issued against the debtor.

This was an appeal from the decision of a master in chancery, disallowing a claim made by the appellant on the estate of John C. Cook, an insolvent debtor, which was assigned to the appellee, under *St.* 1838, *c.* 163. The claim was on the following note, indorsed by said Cook, and by him delivered to the appellant: "Boston, June 12, 1839. Thirty days and grace after date, I promise to pay my own order three hundred dollars, value received. Jno. C. Cook."

It was agreed by the parties, that before the said note became due and payable, said Cook's estate was duly assigned to the appellee, under *St.* 1838, *c.* 163, and was insufficient to pay his debts in full; that the first publication of notice of his insolvency was made according to law, on the 12th of July 1839; that the appellee was duly chosen assignee of his estate; that the appellant presented said note, as a claim against said Cook's estate; and that said claim was disallowed by a master in chancery.

The facts, on which the validity of the appellant's claim was contested, were also agreed by the parties.

Andrew, for the appellant.

G. G. Hubbard, for the appellee.

Shaw, C. J. The first question is, whether the appeal, in this case, from the decision of the master in chancery, disallowing the appellant's claim upon the estate of Cook, the insolvent debtor, was rightly taken to this court.

By the insolvent law, (*St.* 1838, *c.* 163, § 4,) such appeal shall be heard and determined in the supreme judicial court, "if the debt demanded shall exceed the sum of three hundred dollars;" otherwise, in the court of common pleas. By § 3, the debt is to be proved and allowed, as it stood on the day

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of the first publication of notice of the insolvency; and all debts then absolutely due, although not payable till afterwards, may be proved and allowed as if payable presently with a discount or rebate of interest, when no interest is payable by the contract, until the time when the debt would become payable.

The appellant's claim was on a note for $300, not drawing interest, and wanting three days of being due at the time of the first publication of notice. The deduction of three days' interest would reduce this claim below $300. Even without this deduction, it would be exactly $300. But, to warrant an appeal to this court, it must "exceed" the sum of $300. The appeal should have been to the court of common pleas, under the alternative clause in the statute; and this court has no jurisdiction of the other question raised in the case.

Appeal dismissed.

Merritt Jordan, Petitioner.

A "fraudulent conveyance," which, by *St.* 1844, *c.* 178, § 9, is made a cause for proceeding against an insolvent debtor under *St.* 1838, *c.* 163, includes not only a conveyance which, by the common law and the *Sts.* of Elizabeth, is fraudulent and void as to creditors, but also a conveyance made with intent to give a preference to a pre-existing creditor, which is made void, as to the other creditors, by *St.* 1841, *c.* 124, § 3.

To authorize the issuing of a warrant, under *St.* 1844, *c.* 178, to seize the estate of a debtor, on the ground of his having made a fraudulent conveyance by way of preference, it must be shown, 1st, that the debtor was insolvent, or contemplated proceedings in insolvency, at the time of making the conveyance, and that he made it with a view of giving a preference to a pre-existing creditor; 2d, that he then had no reasonable cause to believe himself solvent; and 3d, that the creditor, at the time of receiving the conveyance, had reasonable cause to believe the debtor was insolvent: And the burden of proving the first and third of these propositions is on the creditor who petitions for the issuing of the warrant.

The allegations in a petition for the issuing of a warrant to seize the estate of a debtor, under the insolvent laws, though made on oath, as required by *St.* 1844, *c.* 178, § 9, are not to be received as evidence, on the hearing of the petition; nor can the debtor be called upon to testify, without his consent, on the preliminary question whether he shall be adjudged an insolvent.

This was a petition, praying that a warrant, issued by a master in chancery, against the petitioner, under the insolvent law, might be superseded.

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It appeared that the said warrant issued on the petition of Gideon L. Knapp, a creditor of said Jordan, in which it was alleged that said Jordan, on the 15th of May 1845, being insolvent, or in contemplation of insolvency, made a fraudulent conveyance, by mortgage, of all his property that was liable to attachment, to N. M. & L. L. Bradbury, preëxisting creditors of said Jordan, for the purpose of giving them a preference, they having reasonable cause to believe, when accepting said preference, that he was insolvent. The said Knapp made oath that he believed the allegations in his said petition to be true, and the master thereupon ordered notice to be given to said Jordan, that he might appear and show cause why a warrant should not issue, &c. He appeared and filed a plea denying that there was any just ground for said petition, &c. It appeared in evidence before the master, that said Jordan, on the 14th of May 1845, permitted a note for $276·75, due from him to said Knapp, and payable on that day, and which was lodged in a bank for collection, to be protested for non-payment, and that he, on the following morning, made a mortgage of his furniture, and all his stock in trade, to N. M. & L. L. Bradbury, to secure his note to them for $1500, payable in sixty days. Other evidence was introduced by said Knapp; but said Jordan introduced no evidence. The master issued a warrant directing the estate and effects of said Jordan to be seized; assigning the reasons stated in the margin.*

Park, for the petitioner.

Brigham, contra.

* On hearing this case, my opinion is as follows: The *facts* in the petition being verified by oath, and otherwise partially confirmed by legal evidence, or the respondent's admissions, and there being no sworn denial or rebutting evidence on the part of the respondent, the same appear to me to be true. I do not, however, include among the *facts* the allegation that the respondent "has made a *fraudulent* conveyance or transfer of his property;" the fraud being rather an inference from the facts, than a specific fact in itself.

The question before me is, whether the transfer by the respondent of his stock in trade and furniture, made, after his note had been dishonored, to secure a preëxisting debt to a creditor acquainted with his circumstances, is a

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SHAW, C. J. The statutes of 1838, *c.* 163, 1841, *c.* 124, and 1844. *c.* 178, on the subject of insolvency, being made *in pari materiâ*, and constituting one system of proceedings, must be taken and construed together. Under these statutes, the question is, whether the petitioner, Jordan, was liable to be adjudged an insolvent debtor on the petition of a creditor, under § 19, of *St.* 1838, *c.* 163. The *St.* of 1844, *c.* 178, § 9, in addition to the several causes for proceeding *in invitum* against a person as an insolvent debtor, includes the following; viz. "if any person shall make any fraudulent conveyance or transfer of his property, or any part thereof." It was under this provision that the petitioner was adjudged insolvent; and the question is upon its true construction.

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fraudulent conveyance or transfer, within the meaning of § 9 of *St.* 1844. *c.* 178.

The petitioner contends that it is fraudulent, as being contrary to the policy of the insolvent law, and forbidden by its express provisions.

The respondent, on the other hand, contends that, in order to bring the debtor within the involuntary process of the insolvent law, it is necessary to aver or prove that he made the conveyance "in contemplation of his becoming insolvent, *and* of obtaining a discharge under the provisions" of *St.* 1838, *c.* 163, § 10. This was undoubtedly the law under that statute, and it was under it that the case of *Gorham* v. *Stearns* was decided, 1 Met. 367; but the law has been altered by the subsequent *St.* of 1841, *c.* 124, § 3, which now provides, that if the debtor, "being insolvent *or* in contemplation of insolvency," shall give a preference to a preexisting creditor, he shall forfeit his discharge, and that the conveyance shall be void, if the preferred creditor has reasonable cause to believe the debtor insolvent.

The respondent's act is, therefore, clearly contrary to the provisions of the insolvent law, as now amended. The present policy of the insolvent system of Massachusetts is the equitable division of an insolvent debtor's effects among his creditors, and is, in this particular, in harmony with the English bankrupt system. The provision in the English bankrupt law (1 Jac. 1, *c.* 15; 6 Geo. 4, *c.* 16,) is nearly the same with that of our law of 1844. In both systems, "a fraudulent conveyance" by the debtor is made the ground for issuing a commission or warrant. Now, in England, it has been held, for nearly a century, that a transfer, by a trader, of his property, is *per se* fraudulent and an act of bankruptcy. See 1 Christian on Bankrupt Law, (2d ed.) 123, *& seq.* *Worseley* v. *De Mattos*, 1 Bur. 467. *Wilson* v. *Day*, 2 Bur. 827.

In analogy with these cases, I am of opinion that the preference given by the debtor, in the present case, (however well intended,) was, by construction of law, "fraudulent;" and that a warrant must, accordingly, issue against his estate.

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To make one an involuntary insolvent under *St.* 1844, on the ground of having made a fraudulent conveyance, there must be something more than an intent, on the part of the debtor, to give a preference. A fraudulent conveyance implies some fraudulent purpose, knowledge or assent, in both parties. *Bridge* v. *Eggleston*, 14 Mass. 250. Still, what is to be deemed a fraudulent conveyance, within this statute, is not to depend on the old *Sts.* of 13 and 27 Eliz., which did not avoid payments or conveyances in satisfaction of an actual debt, but, on the contrary, allowed any preference, provided only that the conveyance was made to satisfy or secure a real debt. They were such conveyances as were intended to defraud all creditors, and to secure the property to the grantor himself, or to some one not a *bonâ fide* creditor. But under the present laws of this Commonwealth, a conveyance must be deemed fraudulent, if made to defeat the full and fair operation of the insolvent laws; and this may be ascertained by the application of these laws, as a test. The *St.* of 1841, *c.* 124, § 3, provides "that no certificate of discharge shall be granted, or, if granted, it shall be of no effect, if a debtor, within six months before the filing of the petition by or against him, being insolvent, *or* in contemplation of insolvency, shall, directly or indirectly, make any assignment, sale, transfer or conveyance, either absolute or conditional, of any part of his estate, real or personal, intending to give a preference to a preëxisting creditor, or to any person who is, or may be, liable as indorser or surety for such debtor, unless said debtor shall make it appear that, at the time of making such preference, he had reasonable cause to believe himself solvent;" and such preferences are declared void, and the assignees are authorized to recover the full value of the property transferred, "provided the creditor, when accepting such preference, had reasonable cause to believe such debtor was insolvent." Here the avoidance of the discharge is not made to depend on the debtor's contemplation of proceedings under the insolvent laws, but on the fact of being actually insolvent, unless he had reason to believe himself solvent; of which the

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burden of proof is placed on him. In this respect, this statute has changed the law, since the decision of *Gorham* v. *Stearns*, 1 Met. 366. This statute not only avoids the debtor's discharge under these circumstances, but declares the conveyance void; and this, manifestly, because it is in plain violation of the law, and a fraud upon the other creditors.

The court are therefore of opinion that, in order to authorize the master to issue a warrant against a debtor, on the application of a petitioning creditor, under the *St.* of 1844, on the ground that such debtor has made a fraudulent convey ance, he must be satisfied of the following facts: 1. That the debtor was insolvent, in fact, or contemplated proceedings in insolvency, at the time that he made the conveyance, and that he did it with a view of giving a preference to a preëxisting creditor. 2. That he then had no reasonable cause to believe himself solvent. 3. That the creditor, at the time of receiving the conveyance, had reasonable cause to believe the debtor insolvent.

The burden of proof of the first and third propositions is upon the petitioning creditor, and he must prove them by competent evidence. The allegations in the petition, although sworn to by the petitioning creditor, as required by *St.* 1844, *c.* 178, § 9, are not to be received as evidence on the hearing; the effect of the petition under oath being only to authorize the master to hear the case. And we think the debtor cannot be called on to testify, without his own consent, upon the preliminary question, whether he should be adjudged an insolvent. After the master has acquired jurisdiction of the party and of the subject, after the regular institution of the proceedings, he has full power to examine the debtor on oath. As the master appeared to rely, in rendering his judgment, on the allegations in the petition, and the want of a sworn denial by the debtor, the court are of opinion that the issuing of the warrant should be superseded and the proceedings be remitted to the master for further hearing.

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President, Directors, &c. of the Pacific Bank *vs.* Aaron Mitchell.

It seems that the drawer of a bill of exchange payable to his own order, and by him indorsed, is a competent witness in a suit brought by the indorsee against the acceptor.

When the holder of a bill of exchange, accepted for the accommodation of the drawer, sends it to a bank for collection, and the bank, when the bill comes to maturity, passes the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor; but the bank succeeds to the rights of the holder, and may maintain an action on the bill against the acceptor.

This was an action of assumpsit against the acceptor of three bills of exchange. Trial in the county of Nantucket, before *Shaw*, C. J. whose report thereof was as follows:

The plaintiffs gave in evidence a bill, dated September 19th 1842, drawn on the defendant by James Athearn, for $1000, payable, in five months from date, to said Athearn's own order, and by him indorsed in blank, and accepted by the defendant: Also a similar bill payable in six months from date, similarly drawn, indorsed and accepted: Also a bill dated May 19th 1842, for $1000, payable in six months from date, drawn and accepted like the other two, and indorsed by said Athearn, and by Philip Marett, cashier of the New England Bank. All the signatures to these bills were admitted.

The defence stated was, that the first two bills were accepted by the defendant for the accommodation of Athearn, the drawer; that this was known to the plaintiffs; and that they gave time to the drawer, and thus discharged the defendant: That, as to the third bill, the plaintiffs received it of the New England Bank, for collection; that it was collected at maturity and paid; and that the plaintiffs had no interest in it.

To establish the defence, the defendant called James Athearn, the drawer of the bills, as a witness, who was objected to by the plaintiffs, on the ground of interest; but he was admitted as competent, subject to the opinion of the whole court. No other evidence of his interest was offered than that arising out of his relation to these bills, and his liability upon

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them. He testified that he had been president of the Pacific Bank, and was so in January 1843; that the first bill was drawn by him; that he had no funds in the defendant's hands, and that it was accommodation paper; that the same was true of the second and third bills, and that they were accepted for his accommodation; that he could not tell what was done with the first and second bills, when they respectively fell due, in January or February; that he did nothing himself; that he had made provision for his liabilities, generally, to the bank, by various written transfers of property. [Notice was given to the plaintiffs to produce these transfers, but they were not produced.] The witness further testified, that some transfers were made in December 1842, and some earlier; that all of them were taken as collateral security for his liabilities; that he could not say what proportion the security bore to the liabilities, but that he thought, at the time, the securities were about equal to his liabilities; that in May 1843, when this suit was brought, the security exceeded the liabilities; that he thought the plaintiffs had converted some of his property, which they held as security, into money, viz. the ship Zone and cargo, one third of the ship Atlantic and cargo, and about $10·000 of other securities: That the third bill (payable in November 1842) was not discounted by the plaintiffs, but at Boston, and was the property of the New England Bank, and came from that bank to the Pacific Bank, for collection; that he did not know whether it ever went to the credit of the New England Bank or not, but that it ought to have so gone, because it was their property when it matured; that he considered this bill as among the liabilities for which he transferred his property for security.

The witness also testified that when the first bill (dated September 19th 1842) became due, he thought he was not president of the bank.

The defendant then proposed to give evidence, that notice was given to William Mitchell, the plaintiffs' cashier, that the defendant's acceptances were given for the accommodation of

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Athearn, the drawer, as proof of notice to the corporation, (the plaintiffs,) and thus to show that the acceptor (the defendant) stood in the relation of surety to the drawer, and that the arrangement of the bank (the plaintiffs) discharged the acceptor. This evidence, though objected to by the plaintiffs, was admitted, subject to the opinion of the whole court. The same witness then testified that when the third bill, belonging to the New England Bank, became due, the cashier said to him, "I suppose this is your paper, or for you to take care of," and that the witness said, "it is;" that the witness did not know what was done with the bill; that he did not know that the cashier knew that the two other bills were accommodation drafts when they were discounted, nor did he know what was done when those bills came to maturity; that when they were discounted, they were not taken as substitutes for like drafts in the bank.

The witness was permitted to testify (the plaintiffs objecting) that the bills were not discounted by a board of directors. He also testified that he first made transfers to the plaintiffs, to secure his liabilities to them, in August 1842; and that William Mitchell, the plaintiffs' cashier, kept the books of the bank.

On cross-examination, the witness was asked if he had not accepted similar bills for the defendant. This question was objected to, but it was permitted to be put. The witness answered, that he had occasionally accepted similar drafts for the defendant, but not of exactly corresponding dates and amounts, but did not know that he did so after the defendant accepted the bills now in suit; that he thought there must have been some understanding between him and the defendant, though he was not certain; that there was no understanding or agreement that they should accept for each other; and that he could hardly say it was their practice to do so, though it had frequently been done; that he thought he had accepted more for the defendant than the defendant had for him; that he (the witness) procured the three bills to be discounted, one at the New England Bank, in Boston, and the

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others by the Pacific Bank, of which he was then president; that it was done, at the latter bank, with the knowledge of the cashier, and that the amount was paid to the witness, or passed to his credit; that he often passed paper in the same way, having had the principal management of the bank; that he could not say whether his conversation with Mitchell (the cashier) was on the day the bill became due, but that it was either on that day or soon after; that the bills were for him (the witness) to take care of as indorser.

The witness further stated, on the cross-examination, that his first transfer of property to the bank, in August 1842, was known to the cashier, but not to the directors, and that he (the witness) first knew that the directors had knowledge that the transfer had been made, about the 1st of December 1842; that the other transfer, made in December 1842, was made with the knowledge of the directors.

Inquiry was made of the witness, by the plaintiffs' counsel, as to the contents of the transfers; but the judge ruled, that as the plaintiffs had declined to produce the papers containing the transfers, the witness could not be interrogated by them respecting the terms on which the transfers were made.

The witness, on reëxamination by the defendant, said that the value of the Zone and cargo was $37·000, and the value of one third of the Atlantic and cargo was $6000.

It was conceded that the amount of the bill discounted by the New England Bank was passed to the credit of that bank, in account, by the plaintiffs, soon after it came to maturity, and before this action was brought.

Upon this state of the evidence, a verdict was taken for the plaintiffs, by consent, for the sum of $3083·51, the amount of the three bills, with interest, subject to the opinion of the whole court; the court to draw such inferences from the evidence, so far as it is competent, as a jury ought to draw; the verdict to stand, or be reversed or reduced, and judgment thereon, according to the opinion of the whole court upon the questions of law reserved.

The argument was had at the last March term.

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Colby, for the plaintiffs. These were not accommodation acceptances. They were on sufficient consideration, namely, Athearn's acceptances for the defendant. But if they were accommodation acceptances, the plaintiffs had no notice that they were such. The knowledge of a director is not notice to the bank. *Commercial Bank* v. *Cunningham*, 24 Pick. 276. And if the plaintiffs had such knowledge, it would be no bar to this action. Story on Bills, §§ 191, 192, 253. *Fall River Union Bank* v. *Willard*, 5 Met. 216. Nor does the taking of security from the drawer, or the giving further time to him, discharge the acceptor. Story on Bills, § 268. 3 Kent Com. (1st ed.) 56, 57. *White* v. *Hopkins*, 3 Watts & Serg. 99.

Coffin, for the defendant. The defendant must be regarded as an acceptor for Athearn's accommodation, and the plaintiffs must be held to have had notice of this fact, inasmuch as it was known to their president and cashier. The defendant was like a surety, and he was discharged by the giving of time to the drawer. *Laxton* v. *Peat*, 2 Campb. 185. *Collott* v. *Haigh*, 3 Campb. 281. The defendant is discharged by the taking of security from the drawer by the plaintiffs. *Bradford* v. *Hubbard*, 8 Pick. 155. See also *Boston Hat Manufactory* v. *Messinger*, 2 Pick. 223. *Baker* v. *Briggs*, 8 Pick. 122.

The plaintiffs have made the bill their own, which was discounted by the New England Bank, by crediting it to that bank; and the legal presumption is, that it was paid from funds in the plaintiffs' hands.

Hubbard, J. This case came before the court upon a report of the evidence by the presiding judge, with an agreement that the court might draw such inferences from the evidence as a jury might be warranted in drawing. Upon the evidence thus reported, it was argued that the two bills, drawn September 19th 1842, were accepted for the accommodation of the drawer; that this was known to the plaintiffs, the holders, who gave time to the drawer; and that the giving of time discharged the acceptor, who is to be considered the same as a surety.

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Athearn, the witness offered by the defendant, was objected to as interested, being the drawer and indorser of the bills; but the objection was overruled. As this objection is not now pressed, we are not called upon to express an opinion upon it; but no other interest being shown, but that of being a party to the bill, we think the case is probably not distinguishable, in principle, from the case of *Thayer* v. *Crossman*, 1 Met. 416.

It is proved by the testimony of the drawer, that the acceptances declared upon were made for the accommodation of the drawer, who was the president of the bank. But it does not appear that this fact was communicated to the directors, or that the cashier had any certain knowledge of it. And though we incline to the opinion, that the acts of the president, in procuring a discount for himself, with the knowledge of the cashier, is not the act of the directors, so as to bind the plaintiffs with constructive knowledge, yet as the evidence does not sustain the point raised, namely, that time was given by the plaintiffs on receiving the security from the drawer, we think the fact, whether the directors knew that the drafts were accommodation paper or not, is unimportant; because accommodation acceptors stand in the same relation to *bonâ fide* holders, as acceptors for value.

In respect to the bill bearing date May 19th 1842, and which was discounted at the New England Bank, and by that bank remitted to the plaintiffs for collection, we are of opinion that the passing of the amount of it to the credit of the New England Bank by the plaintiffs, when it came to maturity, was not such a payment of the bill as to discharge the acceptor. The plaintiffs succeeded to the rights of the New England Bank, and became *bonâ fide* holders of the bill.

Another point was urged upon the court, viz. that the bills were paid by the assignment of property made by the drawer for the payment of his liabilities to the bank. But this is a question depending upon facts which we have not now the means of ascertaining. The transfers of property appear to have been made generally, without the drawer's specifying to

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what liabilities they should be applied; and we are ignorant whether any appropriation was made by the directors or not It would seem, as the case now stands, that the assets should be applied, *pro ratâ*, to the discharge of all the liabilities of the drawer; but this point we cannot now determine. We are of opinion, therefore, that the verdict should be set aside, and a new trial granted, in order to ascertain whether the proceeds of the property transferred to the plaintiffs is applicable, in whole or in part, to the demands sued in this action, and also what amount had been realized from them, at the time of the commencement of the action. And the new trial is to be limited to these inquiries.

JOSEPH W. JENKINS, JR. & others *vs.* JOSEPH H. NEWELL & others.

The provision in *St.* 1842, *c.* 56, § 1, that a person "arrested on mesne process, or execution, for any debt, may give notice to the officer having him in custody, or, if he be then bailed, to the officer who made the arrest, that he is desirous to take the oath prescribed for poor debtors confined on execution," authorizes a debtor who is committed on execution, and gives bond for the liberty of the jail limits, to give such notice to the jailer.

DEBT on a bond for the liberty of the jail limits. The case was submitted to the court on the following statement of facts:

Joseph H. Newell, one of the defendants, was arrested, May 10th 1843, upon an execution which issued on a judgment recovered against him by the plaintiffs, and was committed to the jail in Boston, by W. Freeman, a deputy sheriff. On the same day, said Newell, as principal, and the other defendants, as his sureties, gave the bond on which this action is brought, conditioned as the law in such cases requires. On the 21st of July 1843, said Newell, then on the jail limits by virtue of said bond, gave due notice to N. Coolidge, keeper of said jail, of his inability to pay the debt for which he

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Joseph H. Newell, one of the defendants, was arrested, May 10th 1843, upon an execution which issued on a judgment recovered against him by the plaintiffs, and was committed to the jail in Boston, by W. Freeman, a deputy sheriff. On the same day, said Newell, as principal, and the other defendants, as his sureties, gave the bond on which this action is brought, conditioned as the law in such cases requires. On the 21st of July 1843, said Newell, then on the jail limits by virtue of said bond, gave due notice to N. Coolidge, keeper of said jail, of his inability to pay the debt for which he

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was committed, and of his desire to take the benefit of the law for the relief of poor debtors. Said Coolidge thereupon made known the same to a justice of the peace, who appointed the 28th day of said July, at 10 o'clock, A. M., and the office of said jailer, as the time and place for the examination of said Newell; and notice thereof was served by said Coolidge, on the 21st of said July, upon the plaintiffs' attorney of record. At the said time and place so appointed, the said Newell appeared and submitted himself to examination. The plaintiffs also appeared by their attorney, and (reserving all right of objection to said application of said Newell and the proceedings thereon, and protesting that the same were irregular) put in certain interrogatories *de bene esse*. Upon the examination, the justices before whom it was made were satisfied of the truth of the facts set forth in the oath prescribed by law to be taken by poor debtors, and that the said Newell was entitled to his discharge; and said oath was administered to him, and a certificate thereof was duly granted under their hands. The said Newell, relying upon the said discharge, did not surrender himself, at the expiration of ninety days from the day of his commitment, at the jail house, for the purpose of being committed to close confinement, nor did he make payment of the execution upon which he was arrested.

M. S. Clarke, for the plaintiffs.

A. H. Fiske, for the defendants.

Hubbard, J. The only question presented for the consideration of the court is, whether the notice served upon the judgment creditors was in conformity to the requirements of *St.* 1842, *c.* 56, § 1. If the notice was given through an officer not authorized by the statute, it is then contended that such defect is fatal, and avoids the discharge; the certificate of the magistrates not being conclusive evidence of the regularity of the prior proceedings. *Little* v. *Hasey*, 12 Mass. 319. *Putnam* v. *Longley*, 11 Pick. 487. *Slasson* v. *Brown*, 20 Pick. 436.

The argument of the plaintiffs' counsel is, that the debtor,

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after giving the bond, was no longer in the custody of the jailer; was not within the four walls of the prison, nor subject to his watch and control; and that the jailer had no more authority to arrest him than any person accidentally within the prison limits, and consequently was not an officer having him in custody, within the meaning of the law, and therefore not legally capable of receiving the notice and communicating it to a justice; a legal notice being necessary to sustain the subsequent proceedings. 11 Pick. *ubi sup.*

The *St.* of 1842, *c.* 56, (now repealed,) was remedial, and was intended to provide for all cases of debtors arrested on mesne process, or on execution, who were desirous of taking the oath prescribed for poor debtors; directing the manner of giving notice to the creditors, and also imposing it as a duty upon the officer, at the time of making the arrest, to inform the debtor of his right to take the oath, after giving the requisite notice. The first section of the statute embraced, in the same paragraph, the several cases of a debtor arrested on mesne process, and one taken on execution; and he was authorized to "give verbal or written notice to the officer having him in custody, or if he be then bailed, then to the officer making the arrest." In the case at bar, the judgment debtor was taken on execution, and after his commitment, he gave a bond for the liberty of the prison limits; which bond is now in suit. The notice, which he gave, of his intention to take the poor debtors' oath, was to the jailer, and not to the officer who committed him.

We are of opinion that the notice was given to the proper officer. The statute did not mean to leave cases unprovided for, and to hold persons in confinement for want of a proper officer, by whom a notice of the intention to take the oath might be legally served.

The officer who made the commitment had no longer any authority over the debtor; he had no right to retake him, or to hold him in custody, at the request of another. He had fully discharged his duty, and his official responsibility had terminated.

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The jailer was the officer to whose custody he was committed, and by whom he was held in close confinement till he was admitted to the liberty of the prison limits by force of his bond. The debtor continued a prisoner, within the meaning of the statute; and while the bond relieved him from the inclosure of the prison walls, it did not permit his going beyond the prison limits with impunity; and though not subject to the strong hand of the jailer, for which the bond was the substitute, still it was to the jailer that he was, by law and by the condition of his bond, to surrender himself for the purpose of being committed to close confinement. Rev. Sts. *c.* 97, § 63. The jailer was, therefore, the officer having the debtor in custody, according to the intent and within the meaning of the statute; and whose duty it was to serve the notice on the creditors, and to receive their debtor as a prisoner in case of his surrender; and whose responsibility, as an officer, though in part suspended, was never terminated until the debtor was legally discharged.

Plaintiffs nonsuit

Benjamin B. Mussey *vs.* President, Directors, &c. of the Eagle Bank.

Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or of its customers required it, certified that checks were "good," which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller, as such.

The usage of issuing certificates of deposit, by a teller of a bank, is not evidence to prove a usage of certifying checks.

A teller of a bank, as such, has no authority to certify that a check is "good," so as to bind the bank to pay the amount thereof to any person who may afterwards present it; and a usage for him so to certify a check, to enable the holder to use it at his pleasure, is bad.

Assumpsit to recover the amount of a check drawn on the defendants, on the 2d of November 1841, by George F

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Cook & Co. for four thousand dollars, payable to said Cook & Co. or bearer, and on which the following words were written by the defendants' teller: "Good. H. B. Odiorne, Teller."

At the trial before *Wilde*, J. it appeared that Cook & Co. had no funds in the defendants' hands, when the check was presented for payment; that Jeremy Drake, cashier of the Freemans Bank, received the check from Cook & Co., as cash, presented it to the defendants for payment, and after payment thereof was refused, caused it to be protested, and sold it to the plaintiff for $3000.

It also appeared that Odiorne, the defendants' teller, had been in the habit of certifying that the checks drawn on the defendants by Cook & Co. were "good," and that such checks had been received as cash, at different banks, as well as by individuals.

The defendants gave in evidence the 23d article of their by-laws, which is as follows: "It shall be the duty of the teller to make all payments from the bank, including all notes or bills discounted, and to receive payment of such notes, or bills, when due; he shall account daily, and oftener if required, with the cashier, for all sums he may receive, and in case of delinquency, he shall be responsible for the amount thereof. All checks on this bank, received by the teller, shall be delivered, on the day of their receipt, to the book-keeper, to be entered by him; and all checks on other banks shall be presented for payment, before one o'clock, on the day he shall receive the same. And if the teller shall pay any check on this bank, the person drawing the same not having the amount thereof to his credit in the bank, he shall be charged with the amount overdrawn, provided the same was done without application to the book-keeper; but if the book-keeper shall have declared the check to be good, he shall be responsible for the amount overdrawn. He shall also receive all money, bills or checks, brought to the bank to be deposited, and enter the same to the credit of the person depositing them, or to the credit of such person as the depositor shall direct, he

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giving a list of such deposit to the teller. Also, he shall receive payment of all notes, bills, and demands, left for collection, and when the proprietors thereof shall desire it, he shall pass to their credit the amount of bills and notes discounted."

Much testimony was introduced as to the custom of tellers of banks in Boston to certify checks as good; and upon the whole testimony in the case, (which need not be here stated,) the plaintiff's counsel requested the judge to instruct the jury as follows: "That if they should be satisfied, from the evidence, that Odiorne, from the time he became teller, and during his holding said office, certified the checks of the customers of the bank, when funds to the amount were to their credit, whenever their convenience, or that of the bank required it; and if the jury should be further satisfied that this was, in any instance, known to the bank, and not forbidden, and that, during the same period, it was the custom of all the other tellers of banks in Boston, in like manner, to certify checks; the jury would thereupon be at liberty to infer that the power thus to certify was an original, inherent, implied power of said Odiorne, as such teller, unless the existence of such power, in said Odiorne, be negatived by the other evidence in the case: That the usage of the defendants, and of the other banks in Boston, to allow certificates of deposit to be certified by their respective tellers, was evidence in support of a usage of such tellers to certify checks, or of their authority so to do: That if the jury should be satisfied, from the evidence, that it was known to the defendants that Odiorne occasionally certified as good the checks of Cook & Co., and the defendants did not prohibit the same, but acquiesced therein, they would thereby become bound to pay any checks of Cook & Co., subsequently certified by said Odiorne, whether made fraudulently or otherwise, as against a *bonâ fide* holder of such checks, without notice or ground of suspicion of want of authority, or of fraud, on the part of said Odiorne."

But the judge instructed the jury, that an original, inherent, implied power of the teller could not be so inferred; and he

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also instructed them as follows: The question is, whether the certificate of the teller, that the check was good, binds the bank. If he had any authority to bind the bank by that acceptance, the plaintiff may maintain this action. It is not contended that he had any express authority. The by-laws of the bank forbid it; and if it stood on those, there would be no authority. And no such authority is implied from the nature, or by virtue, of the office. The case must turn upon the question, whether there is such a custom or usage as, under the circumstances, should hold the bank. Usage to issue certificates of deposit does not show such usage in case of checks. The custom, in order to bind the bank, must be a good one, and be so general as to bring home a general knowledge of it to the business community; and the jury will judge, from all the testimony, whether a general custom is proved. Whether the custom, if proved, is good, is a question of law for the court. The general question for the jury is, whether the check was certified according to any usage or authority, and whether it was received by Drake without notice or cause to suspect that Odiorne had no authority. If Drake knew that it was not according to usage for a teller to certify checks, he could not have recovered of the defendants, though he intended no wrong, unless the defendants had held up Odiorne as a certifying officer. And the plaintiff can stand in no better position than Drake. If there was any usage authorizing Odiorne to certify checks, and this was certified according to the usage, and Drake took it in the usual course, without any circumstances to lead him to suspect any thing, then the verdict should be for the plaintiff; otherwise for the defendants.

The jury returned a verdict for the defendants, and the plaintiff moved for a new trial; alleging, as a cause therefor, the instructions given to the jury, and the refusal of the judge to give the instructions requested by the plaintiff's counsel. A full report of the testimony was prepared, and was presented to the court at the hearing of the motion for a new trial.

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Fletcher & Bartlett, for the plaintiff.

C. G. Loring & A. H. Fiske, for the defendants.

HUBBARD, J. It is proved that Cook & Co. had no deposit to their credit, in the Eagle Bank, at the time the check was drawn, nor when it was presented for payment; and it is admitted that the action cannot be maintained against the defendants, unless the word "good," written by their teller, and certified by his signature, binds the bank. It is also agreed, or proved, that the teller had no direct authority conferred upon him to certify checks as good. Unless, therefore, a teller has power, by virtue of his office, thus to bind the bank; or a custom thus to certify checks exists among banks, for the purpose of giving them currency with third persons, on the credit of the bank; or the defendants have sanctioned the practice of the making of such certificates, by their knowledge of its use, which they have not forbidden; this action, it is admitted, cannot be sustained.

These several propositions embrace, substantially, the subjects which have been discussed, and upon which the plaintiff grounds his motion for a new trial. One of the propositions of the plaintiff's counsel is stated thus: That the jury should have been instructed, that if the proof should warrant the inference that Odiorne, while teller, certified the checks of the customers of the bank, and this was, in any instance, known to the bank, and was not forbidden; and that, during the same period, it was the custom of all the tellers of other banks so to certify checks; the jury would be at liberty to infer an original, inherent, implied power in Odiorne, as such teller, thus to certify checks. But certain facts are stated, in this proposition, as furnishing evidence of inherent power, which are rather applicable to the question and binding nature of a usage. They may prove the latter, while they by no means establish the former. The question of inherent power, and that of usage, should be separately considered, in order to arrive at a correct conclusion.

1. And first; has the teller of a bank an original, inherent, implied power to certify checks as good, by virtue of his

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office? Or, in other words, has the teller of a bank an inherent power to bind the bank to the payment of any given sum of money, at a future time, to any person who shall produce a check, which he has, by writing upon it the word "good," in fact accepted to pay? Because, unless the word "good" carries with it binding evidence of the fact that the money is in the bank to meet that particular check, and that it will be paid to the bearer at any time when it is presented, it is of no practical utility. It will amount to no more than this, viz. that, at the moment of presentment, the check is good, and will be paid, if then handed in; but not that it will continue good two hours after, if, not being offered, other checks of the same drawer are presented, to the amount of his deposit in the bank.

The office of the teller is implied in the word used to designate it — to tell or count the moneys of the bank, which are received or paid out. The office is often divided into two branches, that of receiving teller and of paying teller, where the business of the bank is large, and the duties cannot conveniently be united in one person. When united, the duty of the teller is, to receive all moneys offered at the bank in payment of notes and bills previously discounted or lodged for collection, as they severally fall due, and all moneys offered by customers of the bank, to be deposited to their credit in account, whether arising from moneys brought by them to the bank, or the proceeds of discounts made for them; to pay the checks of depositors, as the money is, from time to time, drawn out, or for notes discounted; and to redeem the bills of the bank with specie, when the same is demanded. This is his official employment; and, in the discharge of these duties, he is regularly to account for the moneys he has received and paid out, not only to prevent mistakes, but to charge him when short or delinquent; and he is also made responsible for the payment of a check, when the drawer has not a like amount to his credit, unless he applies to the book-keeper for information as to the state of the drawer's account; and then, if an over payment is made,

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through the mistake or fault of the book-keeper, he, and not the teller, is responsible for the loss. And when checks on other banks are received in payment, or on deposit, (as is the usage among the banks in the city,) it is made his duty to attend to their collection by a given hour of the day. These are the powers and duties usually assigned to the office of the teller; and they are plain and explicit. They relate to the direct receipt or payment of moneys, and to a true and accurate accounting for such receipts and payments. His duties respect the daily cash transactions of the bank, and they do not relate directly to the *credits given* by the bank to its customers, or borrowers, on the loan of its funds. His office is not confounded with that of the discount clerk, or the book-keeper; but his daily minutes, and the checks paid or received by him, are handed to the book-keeper, for him to make the proper entries, by which the concerns of the bank may be known when tested by the teller's cash on hand.

In these powers and duties, thus conferred upon the teller, and to be exercised by him in the discharge of the appropriate functions of his office, there is no inherent, original power, expressly conferred, to enable him to certify that the checks of the depositors at the bank will be good, when presented for payment, at some future time; nor is such power incident to, or necessary to, the faithful discharge of any of his duties. Powers which are neither incidental nor necessary are not to be implied, when the rights of others are thereby involved. The power in question is, in fact, not only not implied as incidental to the proper performance of the duties of the office, but the teller is not a regular certifying officer, as to the state of any depositor's account; for he has not the means of certifying it. Nor is he responsible for the book-keeper's statement. Nor does such power exist in the book-keeper; for, during the business hours of the day, he is not the receiver of all the checks drawn by the depositors, as they are paid at the bank, nor is he answerable for the amount, until handed to him for entry in his books. Such certificate would, in fact, require the names of both the officers, that the drawer's

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account was good for the face of the check, before either of them could have evidence of the fact to be certified. Nor could they be secure from difficulty arising out of the constant pressure of business, without actually charging the check thus certified; and even if charged, they would be without a voucher, till the check should be handed in for payment.

Such a power of certifying is, in fact, a power to pledge the credit of the bank to its customers; a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them; and consequently, it cannot be implied as a resulting duty or authority in any individual officer. Evidence of usage, therefore, can imply no original, inherent and implied power in tellers thus to certify, however it may bear on the question of binding a bank by the allowance of such a usage.

2. It is contended that a usage for tellers of banks thus to certify that checks are good, and such usage being known to the business community, is a usage binding on banks, and that the holder of a check so certified may recover it from the bank on which it is drawn; and that proof of a usage, on the part of this bank and the other banks of the city, to allow certificates of deposit to be certified by their respective tellers, is evidence in support of a usage of such tellers to certify checks, or of their authority so to do.

Upon this point, the judge, at the trial, instructed the jury, that if any such general usage existed, and if it was a good usage, the defendants would be bound by it; but whether the usage was good or not, was matter of law for the court to decide, and was not a question for the jury; and that a usage to issue certificates of deposit was not evidence to prove a usage of certifying checks.

In examining the evidence which was offered to the jury, and which is reported at some length, we are well satisfied that no such general usage has been proved; but that, in some of the banks, a practice has existed for one of the officers of the bank, and generally the teller, to certify that the check of

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a depositor is good, when it was necessary for him to use his check at another bank, after bank hours, to prevent the protest of a note; in which case, his check would, of course, be presented for payment, the next morning, by the bank receiving the same; or occasionally, when a remittance was to be made to a correspondent at a distance; and sometimes, for the convenience of the officers, where the money was needed, to be paid at another bank, and the amount of the check was large, to save the labor of counting the bills. The cases vary from the one at bar. They were evidently those of special convenience for a particular occasion, and which, from the uprightness of the officers and the solvency of the parties, worked no mischief. But even these cases were neither proved to be general, nor applicable to all the banks, so as to establish a usage. The case at bar, on the other hand, was the giving of large credits to the persons drawing the checks, to enable them to borrow money on the strength of the certificates. In some banks, checks were occasionally certified for customers, to be used by them, at their convenience, where the funds were in the bank to meet them; but the practice, as proved, was of such limited extent as not to bear on the question of usage.

But if a usage had been proved of the certifying, by the teller, that the check is good, to enable a holder to use it afterwards, at his pleasure, we are clearly of opinion that such a usage would be bad, and could not be upheld. It would give to bank checks, which are intended for immediate use, and are the substitutes for specie, in the ordinary transactions of business, the character of bills of exchange, payable to the bearer, the bank being acceptor, and payable at an indefinite time. It would lead to loans to favored individuals, without the usual security; it would substitute checks for cash, in the hands of tellers who receive them, and would confer the power upon a single officer to pledge the credit of the bank by the mere writing of his name; a power never contemplated by the legislature, nor intended to be conferred by the stockholders. It would expose the teller to the frauds of a

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book-keeper, and both of them to the temptations of unprincipled and greedy men, who might, under various pretences, procure their checks to be thus certified, in the first instances, when their deposits were good, and afterwards, when there was no balance to their credit; allowing interest, as a bonus for the certificate, to the certifying officer, who would afterwards receive such checks as cash. And the present case well illustrates the hazards and the evils to which banking companies and their officers are exposed by the allowance of such a practice.

It has been pressed, in the argument on the subject of usage, that this certificate of "good," on the check, is but another form of the exercise of a usage, so common in banks, to grant, by the teller, a certificate of deposit of money to the credit of a third person. But we are of opinion, with the judge before whom the trial was had, that usage of the one will not support the practice of the other. The two practices, while having the appearance of resemblance, and although one may be used for the same purpose as the other, in the form of a remittance, are, in their character, essentially distinct. A certificate of deposit is regularly issued only when money is actually paid into a bank, for the benefit of a third person, and is placed to his credit; by means of which certificate, and on the return thereof, he can draw for the money deposited; or, if the money is not actually deposited, but the check of the party procuring the certificate is given, such check is immediately charged to the account of the drawer. This is a transaction in which money is actually paid for the certificate; and the certificate is no more than entering the amount in the depositor's bank book. The difference is, that the credit is given to the correspondent of the depositor, and not to the depositor himself. But where a check is certified, as in the case at bar, no money is deposited, no check is received, and the teller can only rely on the declaration of the book-keeper that the check is good. The transaction enters not into the books of the bank; is not necessarily known by its higher officers; and yet, it is contended, the bank is bound by the transaction.

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In examining the evidence, it is apparent that the defendants have never sanctioned the practice of authorizing their teller to certify checks as good, in order to their being used, by the drawer, to raise a credit with third persons. And, admitting it to be proved, (though of that we are not satisfied,) that the cashier, in one instance, knew that the teller certified a check of Cook & Co. as good, and did not prohibit him, still, the teller having no legal right, either express or implied, thus to obligate the bank, the knowledge of the cashier could not affect the defendants. Such an acquiescence on the part of the cashier, whether the consequence of haste, or ignorance, or improper motive, or a mistaken view of his own powers, could not create a contract between the bank and the holder of any other check thus certified.

What the legal consequence would be, if the check was good at the time of such certificate, and was certified with the knowledge and acquiescence of the cashier, and was taken, *bonâ fide*, on the faith of such certificate so approved, we are not now called upon to express an opinion.

The view taken of the case makes it unnecessary to decide on that part of the instructions of the presiding judge, whether Drake took the check under such suspicious circumstances that he was bound to make inquiry. Leaving this subject, therefore, for future consideration, if the point should hereafter arise, we are satisfied that the instructions were sufficiently favorable to the plaintiff, and that there is no just cause for disturbing the verdict.

Judgment on the verdict.

DAVID N. FALES & another *vs.* PHINEHAS STONE & others
WILLIAM JONES *vs.* PHINEHAS J. STONE & others.

Several defendants, in an action for a tort, who had pleaded jointly in the common pleas, pleaded severally in this court, and filed a joint specification of defence *Held*, upon a nonsuit of the plaintiffs, that the defendants were entitled only to joint costs in the common pleas, but to several costs for travel and attendance in this court. *Held also*, that an aliquot part of the cost for witnesses, court dues, &c. might be taxed for each defendant, or that those items might be otherwise so distributed that.

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taking them together, the plaintiffs should be charged no more than if the defendants had recovered only joint costs.

When several defendants, who are entitled to several costs, appear by one and the same attorney, the *St.* of 1842, *c.* 67, does not prohibit the taxing of the attorney's attendance for each defendant.

Three defendants, who were sued in an action for a tort, pleaded severally: At the trial, a nonsuit was entered, subject to the opinion of the whole court: One of the defendants then died, and the whole court afterwards confirmed the nonsuit, and awarded several costs to the surviving defendants: The administrator of the deceased defendant then filed a petition that costs might be allowed to him, as such administrator, and that a judgment might be rendered therefor: Notice of this petition was served on the original plaintiffs, and they appeared and showed cause. *Held*, that no right to costs vested in the deceased defendant, in his life time; that the suit, as to him, was abated by his death; and that the petition could not be supported. *Held also*, that the respondents (the original plaintiffs) were entitled to costs on said petition, and to a judgment therefor against the administrator, *de bonis propriis*.

Shaw, C. J. These were suits commenced in 1840, the first charging three defendants, to wit, Phinehas Stone, Phinehas J. Stone and Silas Stone, and the second charging the same defendants and Amos Stone, in case, for obtaining goods of the plaintiffs by false pretences, in nature of conspiracy. One was brought to trial at November term 1841. After the plaintiffs had finished their case, the judge, on motion of the defendants, and without objection on the part of the plaintiffs, directed a nonsuit, subject to the opinion of the whole court on a case to be reported; and the other action was continued, to abide the event of the former. On the 2d of March 1842, Silas Stone died. On the 20th of March 1843, the court, after argument, confirmed the nonsuit, and ordered judgment for the defendants for costs. On the 30th of the same March, the plaintiff in the other action discontinued, whereupon the defendants had a judgment for costs.

The question is, whether the surviving defendants are entitled to several costs, and if so, to what costs. It has been contended for the plaintiffs, that as the defendants joined in their plea in the court of common pleas, and filed, in this court, but one bill of particulars, although they severally pleaded the general issue, yet they are entitled to one bill of costs only. But we think the point is now settled by authorities and practice, that when, in an action founded on tort, the defendants severally plead the general issue, and

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two or more prevail, they are severally entitled to costs. *Mason* v. *Waite*, 1 Pick. 456. *West* v. *Brock*, 3 Pick. 303. Nor does it, in our judgment, make any difference, that the defendants united in filing a bill of particulars. It is the plea that governs the judgment.

But as to the amount of the costs, the court are of opinion that they can tax one bill of costs only, in the court of common pleas, where they pleaded jointly, but are entitled to several costs from and after the time of pleading severally in this court. This, however, is to apply to travel and attendance only; for witnesses' fees, court dues, and other expenses incurred, an aliquot part may be taxed in favor of each defendant, or they may be otherwise so distributed, that, taking them together, the plaintiffs shall be charged no more than if the defendants had recovered a joint bill of costs.

In regard to attendance, it was contended, on the authority of *St.* 1842, *c.* 67, that several attendance should not be taxed, because the several defendants appeared by one attorney. But this, we think, is not a sound construction. Several defendants, in the same suit, may appear by one and the same attorney, as well as defendants in several different suits. The attendance fee is not put at a rate to compensate an attorney for actual attendance in each case, but is regulated, we presume, by the assumption, that an attorney, in common practice, will attend for several different persons, and that the aggregate will afford him a reasonable compensation.

Judgments for several costs

A. Cushing, for the defendants.

Brigham, for the plaintiffs.

In the course of March term 1843, at which the above judgments were rendered, to wit, on the 20th of June, a petition was filed by Phinehas Stone, as administrator of the estate of Silas Stone, deceased, setting forth, that on the 6th of the said June, he was appointed such administrator, and also alleging the other facts above stated, and praying a judgment against the plaintiffs, in both these cases, for costs

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Notice to show cause was ordered to the respondents, the original plaintiffs, who came in, and the parties were heard.

Shaw, C. J. The court are of opinion, that the petitioner, as administrator of Silas Stone, is not entitled to a judgment for costs. At common law, the suit abated, by the death of Silas Stone, as to him. An administrator can come in, and prosecute or defend, only by statute; and no statute extends to such a case. By the Rev. Sts. *c.* 93, § 12, the suit must be prosecuted by or against the survivor or survivors. The administrator could not place himself, or be placed, in a condition to become a party to the suit, and could not, therefore, recover costs as a prevailing party. No judgment could ever have been rendered against the administrator, had he been cited, or even voluntarily offered, to come in and defend.

But it is intimated, that by the nonsuit, a right became vested in the intestate to recover costs, and that, though the administrator was not appointed till after judgment in the suit, yet his authority relates back, and will enable him, by a judgment *nunc pro tunc*, or otherwise, to avail himself of such right.

Had the right become so vested, at the time of the death of the intestate, there would have been some force in the argument; but we think it was not so. It is true that a nonsuit had been then ordered, but it was provisional only; it was subject to the opinion of the whole court, on a case embracing the entire merits. It was therefore but a step in the cause. Suppose, instead of the nonsuit being confirmed, it had been set aside, a new trial ordered, and a verdict and judgment against the defendants; could the intestate, Silas Stone, or his estate, have been in any way implicated in that suit, or bound by that judgment? We think not. The cause stood continued, and his rights were dependent upon the future action and judgment of the court. By his decease before any such judgment, he was wholly withdrawn from the cause, and from the jurisdiction of the court.

But it is said, that the subsequent judgment of the whole court, affirming the nonsuit, shows that it was right when it was entered. This is true, but it does not alter the result, in

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this respect. Every judgment for a plaintiff shows that he had a good cause of action when he commenced it; but his judgment cannot, for that reason, relate back. The true answer, we think, is, that the nonsuit was not an effectual proceeding, upon which a judgment for costs could be entered, till after the decease of the intestate under such circumstances that his administrator could not be compelled or allowed to become a party. The result is, that the intestate was not, at the time of his decease, entitled to costs which the petitioner can claim as a right vested in the intestate; nor did the petitioner, nor could he, become a party, so as to claim costs in his own right. *Petition dismissed.*

After this decision, the respondents moved for costs on the petition, which motion was opposed by the petitioner.

Shaw, C. J. On this motion two questions arise. *First*, whether the respondents are entitled to costs. *Second*, if so, whether the judgment for costs shall go against the petitioner *de bonis propriis*, or *de bonis intestati*.

1. The court are of opinion that the respondents are entitled to their costs. By the Rev. Sts. *c.* 121, § 20, in all civil suits and proceedings in which no provision is expressly made by law, the subject of costs is declared to be wholly in the discretion of the court. Under this provision, this seems to be a case fully within the power of the court; and under all the circumstances, we think the costs ought to be allowed. The suit was entirely at an end; the intestate's estate was discharged from all liability, from the time of his decease. The petition was a proceeding instituted for the purpose of recovering money for the estate; and although the administrator might think that there was good ground to proceed, yet it was commenced at the same peril at which an original suit would have been commenced, namely, that of payment of costs in case of failure.

2. The court are also of opinion, that the respondents are entitled to a judgment against the petitioner, *de bonis propriis*. The distinction is stated in *Healy* v. *Root*, 11 Pick. 389, a case which puts the subject on its true grounds. When a suit has

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been commenced by or against one, in his life time, who dies pending the suit, and the administrator comes in to prosecute or defend, he acts simply in his representative capacity, in finishing a suit already begun. But in commencing a new suit, he has a discretion and judgment to exercise; it is his own act; and if he fails, the defendant shall have judgment against him personally, as against any other litigant. At the same time, it is proper to add, that if it is apparent to the judge of probate that the administrator acted in good faith, for the benefit of the estate, the costs paid by him may be allowed in his probate account, as an expense properly incurred in the execution of his office.

One reason for the distinction between a suit already pending, and one commenced by the administrator himself, is, that in the former case part of the costs are incurred in the life time of the deceased, and therefore judgment could not be rendered against the administrator *de bonis propriis*, without charging him personally with the debt of his intestate — which would be unjust — or entering two judgments, which would be irregular.

In testing the present case by the rule laid down in *Healy* v. *Root*, it appears to us that, both in substance and in form, it is analogous to a suit commenced by the administrator to recover money for the estate. The administrator, had he been seasonably appointed, could not be a party to defend with the survivors. The suit was at an end, by a judgment in favor of the survivors for costs. It was a new proceeding by petition, requiring a new summons to bring the party into court, to show cause why a further judgment should not be rendered for his intestate. Looking, therefore, as well to the object as to the form of the proceeding, it was one depending on the will and act of the administrator to commence, or not, as he might judge it to be most for the benefit of the estate which he represented, in the nature of an original suit.

Costs for the respondents.

Choate, for the petitioner.

Brigham, for the respondents.

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Samuel S. Curtis & another *vs.* Jane Hubbard.

A. subscribed this instrument: "I guaranty the payment of the amount of a bill of merchandize, purchased of C. by B.," on a former day, "and of all further sums which B may owe C. for goods which he may sell B. on six months' credit, provided that the whole amount, which B. shall owe C. at one time, shall not exceed $2000; it being the understanding, that I am in no event to be liable for more than that sum: And in case said B. shall fail punctually to pay said C. any sum which may become due to him, I am to have ninety days, after demand in writing is made on me under this guaranty, to pay the amount for which he may be so in default, with interest: And this guaranty is upon the condition that said C. shall, once in every eight months from the date hereof, give me notice, in writing, of the state of said B.'s account with him:" C. took B.'s negotiable note, for the merchandize sold to him before the date of the above guaranty, dated on the day of the sale thereof, payable in six months, and also a like note of B. for the amount of one other bill of merchandize afterwards sold to him; but these notes were not negotiated: B. bought other merchandize of C., at different times, on six months' credit, but failed to pay even the amount of his first note: C. sent to A. a copy of B.'s account, in which all the items of debit and credit, up to the time it was so sent, were stated, including some charges for which A. was not liable, and gave A. written notice, at the same time, that said copy was sent in conformity to one of the conditions of the guaranty: C. afterwards sent a letter to A., giving notice that B. had failed to pay for the goods sold to him on the strength of the guaranty, demanding payment of A., and stating that his account against B. had been previously sent to A: After the expiration of ninety days from the delivery of this letter, C. commenced an action against A., on the guaranty.

Held, that the taking of B.'s notes by C. did not discharge A. from liability to pay for the merchandize for which the notes were given. *Held also*, that A. had sufficient notice of B.'s account with C., and of the amount for which B. was in default, and of the items for which A. was liable on the guaranty.

Assumpsit on the following instruments:

"Boston, July 13th 1839. Whereas Messrs. Curtis & Merriam have, at my request, consented to sell goods to my son William Hubbard, on a credit of six months; now, in consideration thereof, and of one dollar to me paid by them, I guaranty the payment of the amount of a bill of merchandize purchased of them by said William, under date of the 10th of July instant, and of all further sums which he may owe them for goods which they may sell him as aforesaid; provided that the whole amount which he shall owe them, at any one time, shall not exceed eleven hundred dollars; it being the understanding that I am in no event to be liable for more than that sum: And in case said William shall fail punctually to pay said Curtis & Merriam any sum which may

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become due to them, I am to have ninety days, after demand in writing is made on me under this guaranty, to pay the amount for which he may be so in default, with interest: And this guaranty is upon the condition that said Curtis & Merriam shall, once in every eight months from the date hereof, give me notice, in writing, of the state of said William's account with them; and further, that I shall not be liable for any goods which may be purchased after I shall give notice, in writing, that this guaranty is to cease. Jane Hubbard."

"Boston, October 28th 1839. Whereas Messrs. Curtis & Merriam have, at my request, consented to sell goods to my son William Hubbard, on a credit of six months; now, in consideration thereof, and of one dollar to me paid by them, I guaranty to them the payment of nine hundred dollars, in addition to my obligation to them of eleven hundred dollars, dated July 13th 1839; it being the understanding that I am in no event to be liable for more than two thousand dollars in all, upon the same conditions as expressed in my obligation of July 13th 1839. Jane Hubbard."

After the declaration was adjudged to be bad, (6 Met. 186,) it was amended, and the case was submitted to the court on a statement of facts, with power to draw all inferences which a jury would be warranted in drawing from the evidence. This statement was as follows:

The action was commenced on the 11th of March 1841. The plaintiffs sold and delivered to said William Hubbard, on credit of six months, sundry parcels of goods, at sundry times, as per account copied in the margin of the next page.* For the amounts of the bills of July 10th and October 30th 1839, said William's notes were taken at the times of the sales, payable to the plaintiffs, or order, in six months from said dates, with interest after; and for the said bills receipts were given, at foot of the bills, signed by Curtis & Merriam, as follows; viz. for that of July 10th, "received payment by note at six months;" and for that of October 30th, "received note at six months." These two notes have ever remained in the hands of the plaintiffs, unpaid, except so far as sundry payments,

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made by said William, and credited in said account in the margin, have been or should be applied to reduce them. The said William directed the first three items of credit, in said account, to be indorsed on his note of July 10th, at the time of payment; but no directions were given by him as to the appropriation of the other sums paid; nor was any appropriation of them made by the plaintiffs, other than by a general credit in account. The books of the plaintiffs show that

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* William Hubbard to Curtis & Merriam . . . Dr.

1839.			
July 10.	To note at six months,		$1019·61
Aug. 3.	Merchandize, per bill, six months,		235·75
Sep. 17.	Merchandize, " " "		71·16
Oct. 3.	Merchandize, " " "		3·00
" 30.	Note, " "		1969·29
" 31.	Merchandize, " " "		4·75
Nov. 22.	Cash for policy of insurance,		8·00
Dec. 21.	do. expense of sending to Gloucester for goods wrecked there,		3·50
1840.			
June 12.	Merchandize,		182·82
" 13.	Merchandize,		12 49
July 16.	Merchandize,		12·69
	Balance of interest to Jan. 17 1841,		125·79
			3654·85

Contra, . . . Cr.

1839.				
Oct. 3.	By cash,		$160·00	
" 19.	" "		99·85	
" 31.	" "		47·75	
1840.				
June 12.	" "		115·00	
July 9.	" "		240·00	
" 10.	" "		189·55	852·15
				$2802·70
	Deduct goods returned, bo't Oct. 30 1839,		$225·04	
	Less per agreement,		25·04	
			200·00	
	Add for error in casting in bill Oct. 30 1839,		30·34	
			169·66	
	Balance of interest in your favor to June 17 1841,		7·28	176·94
				2625·76
1841.				
Jan. 1.	By cash rec'd of T. Nevins on your account,			93·50
				$2532·26

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these notes were taken for the amount of said two sales; and then, according to the mode of the plaintiffs, the "notes" are posted to the leger, instead of "merchandize," as is done in the other cases, where no notes were taken. The said William paid the plaintiffs the divers sums credited in the said account, at the times therein stated; and on the 1st of January 1841, the plaintiffs received the further sum of $93·50, for which he is credited.

The said William Hubbard is dead, and no administration has been taken on his estate. On the 15th of February 1840, the plaintiffs caused the following letter to be delivered to the defendant: "Mrs. Jane Hubbard: In conformity to one of the conditions of the guaranty you gave us for goods sold to your son William, we now annex a copy of his account. Respectfully, your obedient servants, Curtis & Merriam."

On the same page with this letter was a copy of the first eight items of charge, and the first three items of credit, as stated in the foregoing account in the margin; the balance against said William being $3013·40.

On the 12th of October 1840, the plaintiffs delivered to the defendant a copy of their account against said William, which was like the foregoing account in the margin, except that it omitted the words "six months" on a line with the charges, and also omitted the charge of $125, "balance of interest to January 17th 1841," and all that followed the balance therein stated, after crediting the six payments made by said William; the balance against said William being $2676·91. Accompanying this copy the defendant received this letter: "Madam: Above, we hand you a copy of your son William's account, in conformity to one of the conditions of your guaranty. Respectfully yours, Curtis & Merriam."

On the 17th of the same October, the plaintiffs delivered to the defendant another letter, as follows: "Boston, October 17 1840. Mrs. Jane Hubbard: Your son William having failed to pay us for goods sold him on the strength of your guaranty of July 13th and October 28th, 1839, we hereby notify you that we now look to you for the payment of the

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same, and that the ninety days' notice, required to be given you, commences from this date. Our account against him was sent you on the 12th instant. Respectfully, your obedient servants, Curtis & Merriam."

Deducting the two items of charge in the plaintiffs' account against said William, under dates of November 22d and December 21st 1839, (for which it is admitted that the defendant is not liable,) the balance due and payable on the 17th of October 1840, from said William to the plaintiffs, on the foregoing account in the margin, without interest, and including the two bills for which notes were taken, exceeded two thousand dollars.

Defendant to be defaulted, if she is liable to the plaintiffs, and judgment to be rendered for such sum as they are entitled to recover; otherwise, the plaintiffs to be nonsuit.

English, for the plaintiffs. The construction of the defendant's guaranty has already been settled; 6 Met. 186; and the question now is, whether she has had due notice, by the plaintiffs' letter of October 17th 1840, that her son had failed to pay, or was in default. It was not necessary that she should be informed that demand of payment had been made on her son. The strictness as to notice to indorsers of notes and bills is not applicable to guarantors. The notice informed her how much her son had bought, how much he had paid, and how much he had owed for more than six months. The reference, in the letter of October 17th, to the statement of the account in the letter of the 12th, was tantamount to an insertion of the account in the latter letter.

The notes taken by the plaintiffs, though negotiable, did not operate as payment *pro tanto*. The taking of such notes is only presumptive evidence of payment, which may be rebutted by proof that such was not the intention. And it cannot be supposed that the plaintiffs intended to rely on the notes, and to release the defendant. Where there is collateral security, taking a note does not operate as payment. *Butts* v. *Dean*, 2 Met. 76. *Sturges* v. *Robbins*, 7 Mass. 301. *Duval* v. *Trask*, 12 Mass. 154. *Reed* v. *Upton*, 10 Pick. 522.

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Babcock v. *Bryant*, 12 Pick. 133. *Watkins* v. *Hill*, 8 Pick. 522.

W. J. Hubbard, for the defendant. The defendant is not liable for the goods for which the plaintiffs took her son's negotiable notes. She did not engage to be liable on notes that might go into the hands of third persons; and the cases cited for the plaintiffs do not support the claim now made on the defendant. She engaged only for debt on account, not exceeding $2000.

The demand on the defendant should have been for the sum for which she was liable, and should, on its face, have informed her of the exact amount. The reference, in the letter of October 17th, to the account previously sent to her, if of the same effect as though it had been inserted, did not inform her of the exact amount for which she was liable. She could not know that the notes referred to in the account were given for goods bought by her son. The account showed a credit to her son, to the amount of the notes. If she is to be charged in this action, the provision, in her guaranty, that she should have notice, once in every eight months, of the state of her son's account, is nullified. Part of the items in the account sent to her were not of six months' standing, and she could not be liable for them.

Gardiner replied.

Shaw, C. J.* The declaration in this case having been amended, it now comes before the court on an agreed statement of facts. The main objection relied on is, that the defendant's guaranty was a stipulation to be collaterally responsible to the plaintiffs for the payment of goods sold to her son, on six months' credit; that the plaintiffs took the notes of the son, in some instances, at six months; that such notes operated as a payment and discharge of the debts for goods sold, and so the defendant is not liable on her guaranty. It also appears that the notes remained in the hands of the plaintiffs, and had never been indorsed or negotiated.

The court are of opinion that this objection cannot pre

* *Hubbard*, J. did not sit in this case.

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vail. The rule adopted in Massachusetts, that a negotiable promissory note, given for a simple contract debt, shall be deemed payment, is to be taken with considerable qualification. It is founded on the consideration, that when a note is given for goods, even if it is not negotiated, it is equally convenient to the creditor (and generally more so) to sue on the note, as on the original consideration, and so there is no reason for considering the original simple contract as still subsisting and in force; and therefore a presumption arises, that it was intended by the parties that the note should be deemed a satisfaction. But this is a presumption of fact, which may be rebutted by evidence showing that it was not so intended; and the fact, that such presumption would deprive the party who takes the note of a substantial benefit, has a strong tendency to show that it was not so intended. *Maneely* v. *M'Gee*, 6 Mass. 143. In a recent case, where a bond was given, conditioned to secure a balance of account, and a promissory note was afterwards given for the balance of the account, it was held not to be an extinguishment. *Butts* v. *Dean*, 2 Met. 76. So where a note was given for the amount of goods sold, the note was not considered as satisfaction and payment for the goods. *Thurston* v. *Blanchard*, 22 Pick. 18.

But this case, submitted to the court both as to law and fact, is not without evidence that the defendant so understood it. The first guaranty, dated July 13th 1839, recites the consent of the plaintiffs to sell goods to her son, on credit of six months, and guaranties payment of a bill of goods, then recently purchased, viz. on the 10th of July. And yet a note, one of the notes now in question, had then been given for the same goods, which she, by reciting the contract, must be taken to have known. She then guarantied the payment for goods, though a note had been given for them, and recognized the understanding of the parties, that, in their dealings, taking a note was not intended to extinguish the debt for the goods sold, till payment of the note.

We think there is no ground for the objection, that the notice to the defendant was not sufficiently full and precise,

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as to the items of the amount due. The letter of October 17th, giving that notice, refers to the notice of the 12th, with the account enclosed, stating the items on both sides, and the balance; and this afforded her all the information necessary.

[After this opinion was delivered, the parties agreed on the sum for which judgment should be rendered.]

Caroline Willey & others *vs.* Benjamin L. Thompson, Executor.

The firm of T. & W. were also partners in the firm of P. & Co.: The members of the firm of P. & Co. were incorporated by the name of the Wareham Iron Company, but gave no notice of the dissolution of their partnership, and continued to do business under the name of P. & Co., and became largely indebted to G.: Said company failed, and made an assignment of all their property to T. & W., in trust, first, to pay them, in full, all that the company owed them, and to indemnify them, in full, against all their liabilities for the company, and secondly, to appropriate the residue to the payment, *pro rata*, of the other creditors of the company, who should execute the assignment; and this assignment was executed by most of the creditors: W. afterwards died, leaving a will in which T. was appointed one of his executors: Subsequently, G., who had not become a party to said assignment, sued T., as surviving partner of W., for the debt due from said company to G., and recovered judgment, on the ground that he had no notice, when the debt was contracted, of the dissolution of the firm of P. & Co., of which T. & W. were members: T. paid $29,000 in satisfaction of said judgment, and presented to the judge of probate a claim against the estate of W., his testator, of one half of the sum so paid by him to G.: This claim was disputed by the widow and heirs of W.; on the hearing, it appeared that T., when he so paid G., had in his hands, as surviving assignee of said company, property sufficient to pay all that the company owed T. & W., and also to indemnify him against G.'s judgment. *Held*, that T.'s claim could not legally be allowed; and that he should have charged the amount thereof to the trust fund under the assignment, although he omitted so to do, and charged it to the partnership fund, for the purpose of quieting the company's creditors, who were not preferred by the assignment, and from an apprehension that, if he did not, they might attempt, as G. had, to recover from him their full demands against the company.

When an executor or administrator, pursuant to the Rev. Sts. c. 66, presents to the judge of probate an account between himself and the deceased, and claims a balance as a debt due to him from the deceased, which claim, being disputed, is examined and allowed by the judge, without being submitted to an arbitrator, and parties interested in the deceased's estate appeal to the supreme judicial court, the appeal opens the whole account, and the appellate court has authority, if neither party requests to have the claim submitted to a jury, to decide on the claim, and to decree that there is a balance due from the executor to the deceased's estate.

Shaw, C. J. This case was several times before the court, and it is difficult to give a detailed report of it. It will prob-

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ably be sufficient to state enough of the case to show the bearing of the points decided.

The appellants are the widow and children, heirs at law and legatees of Newton Willey; and they appeal against the allowance of the account of Benjamin Thompson, executor. Thompson was in partnership with Willey, till the time of the decease of the latter, and acted as one of the executors of his will. The principal question arose in respect to one item, charged by the executor in his private and individual account, which, being allowed, rendered the estate of Willey insolvent, but if not allowed, the estate was solvent. The item was for $14,500, being one half of the amount paid to satisfy a judgment recovered by Nathaniel Goddard, against Thompson, as surviving partner of the firm of Thompson & Willey, on a suit commenced after Willey's decease. See 16 Pick. 412.

That judgment was recovered under these circumstances: Thompson & Willey, as partners, had formerly become interested in an iron manufactory at Wareham, conducted under the name of I. & J. Pratt & Co., and which was subsequently incorporated. But though they had been incorporated under the name of the Wareham Iron Company, they still carried on their business in the name of I. & J. Pratt & Co., and gave no notice of the dissolution of that partnership. Goddard became a creditor to a large amount, taking notes in the name of I. & J. Pratt & Co., without notice of the dissolution of that partnership. An action was brought by him, with a view of charging Thompson & Willey as partners, and a judgment was recovered for a sum exceeding $30,000, which was compounded, and $29,000 were paid by Thompson, in full satisfaction. He claimed the right to charge one half of the sum, thus paid, to the estate of his deceased partner. On the contrary, it was insisted that he had no such right, because the Wareham Iron Company, when they stopped payment, made an assignment of a large amount of property to Thompson & Willey, when it was not unlawful to prefer creditors, in trust, to pay expenses and to pay in full all debts due to Thompson & Willey, all sums for which they should be held liable

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as indorsers or sureties, and for all other liabilities which they might be under for the iron company, and the residue to be paid to the general creditors. Under this assignment Thompson received a large amount of property, and charged against it all the debts due to Thompson & Willey, all notes paid by them as indorsers, and compounded with the general creditors, at forty per cent. These facts are condensed from the accounts, and the reports of an auditor, to whom the accounts had been referred in the probate court.

Upon the case thus stated, the court are of opinion, that as Thompson & Willey were copartners in the agreement by which they entered into the concern of I. & J. Pratt & Co., the subsequent judgment recovered against Thompson, as surviving partner of that firm, was conclusive evidence that Willey's estate was equally liable with Thompson; the judgment having established the fact, that the debt to Goddard was contracted in the name of that firm when Willey was liable as a partner. And though Willey had deceased when the action was brought, and was not a party to the suit, his estate was bound both in equity and law.

The object of the assignment made by the Wareham Iron Company, the real debtors to Goddard, was, to treat Thompson & Willey as preferred creditors, and to pay and indemnify them, in full, against all liabilities; whether any particular liabilities were in their contemplation or not, or whether they then knew of their existence or not. The legal liability for the debts of said corporation, under which they stood to Goddard, as partners in the old firm of I. & J. Pratt & Co., in which name the corporation continued to transact their business, comes within this provision, and was covered by this trust assignment. Thompson & Willey were put in the list of preferred creditors, for balance, &c. $64,000, and as indorsers, and for *other liabilities*, generally, without limitation.

It appears by the accounts, that Thompson received from the trust fund enough to pay Goddard's judgment, in addition to all the other preferred claims of Thompson & Willey, and all others, and to leave a considerable surplus to be distributed

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amongst the general creditors, who could only come in, after all the preferred creditors were paid.

The sum paid to Goddard, in satisfaction of his judgment, was, therefore, a proper charge upon the trust fund; and it is not material whether, at the moment when Thompson was called upon to pay that judgment, he had money in hand, from the trust assignment, sufficient to discharge it; (though an examination of the accounts might show that he had;) but, as he had available property, with a full power to use it, and convert it into money, his right to charge it to the partnership fund of Thompson & Willey would not depend upon the accident of his being, or not being, at the moment, cash in hand from the trust fund to pay it.

The consequence is, that the money paid on this judgment of Goddard ought to have been charged, and, in contemplation of law, was charged, to the trust fund arising from the assignment; because, as Thompson was the sole manager of both funds, and kept all the accounts in any manner which he might think most convenient to himself, the fact of his debiting it to either fund could not affect the liability of the fund to which it was properly chargeable. He might *enter* it, in the books, to one of these accounts; as indicating his election, when he had any election. But if it properly and legally belonged to another, it must be considered as actually charged to the account to which it properly belonged; because he must be legally considered to have done, in this respect, what by law he ought to have done, and that such entry was a mere mistake, to be corrected according to the right.

If, after paying the preferred creditors and the charges, there was no surplus, then Thompson, as surviving assignee, had no authority to pay any of the general creditors; and any such payment must be considered as made in his own wrong, or rather, at his own risk, and for his own account.

It is this consideration which has induced the court to consider it immaterial whether the claims of Thompson for commissions, and generally for services and expenses, as charged to the account of the trust assignment, were reason

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able and admissible, or not. In some respects it would have been very material, and the court would have felt bound to give an opinion upon that question. The assignment having provided that the expenses and charges of executing the powers and trusts arising out of the assignment should be paid in full, as well as certain preferred claims, if the fund had proved insufficient to pay the whole of the preferred claims and these expenses in addition, then the estate of Willey would have had a direct interest in determining whether the commissions charged were the just and legal expenses contemplated by the assignment, or otherwise. But as the fund did prove sufficient to pay all the preferred debts, including the debt of Goddard, together with the full amount of commissions *as claimed* by Thompson, and yet leave a surplus, the question of the reasonableness and legality of these commissions ceases to be material, in any view we take of the interests of the parties in this case.

Then it is contended that, although Thompson might and ought to have charged the amount of the Goddard judgment to the trust fund under the assignment, yet that he, together with the estate of his deceased partner, was in danger of being made liable for the whole of the unpreferred debts of the Wareham Iron Co., upon the same ground of partnership liability on which Goddard recovered; and that, as a matter of precaution, it was wise to withdraw that claim from that account, and take the payment upon the partnership account, in order to induce the general creditors the more readily to acquiesce in a settlement under the assignment; a settlement which they would be more disposed to make, if they could receive the amount, or about the amount, of dividend which had been estimated, without reference to the Goddard judgment as a preferred claim; and which they would not be likely to do, if that debt was so charged as a preferred claim. And it was further insisted, that a compromise on this basis, by which these general creditors were quieted, and deterred from proceeding, as Goddard had done, to endeavor to charge Thompson & Willey, as partners, was equally beneficial to

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Thompson and the estate of his late partner, Willey; and that, in the exercise of his discretionary authority as surviving partner, he had a right to charge the whole of the Goddard judgment on the partnership fund of Thompson & Willey; and if he thought it was a beneficial settlement, the exercise of his discretion, in that respect, was decisive.

The court are of opinion that he had no such power. His authority as surviving partner was, to pay the debts of the firm, and those only; and he had no authority to speculate upon the chance of escaping some possible liability, by charging the firm with a debt for which it appears that another ample fund was provided, and in his power.

Besides; suppose this was done with that view, and that Thompson had a real and sincere apprehension that, as surviving partner, he might be chargeable with a large amount of the old debts of the corporation, contracted under the name of I. & J. Pratt & Co., and that, expressly to save himself from that liability, he had agreed to withdraw the same from the fund under the assignment, and charge it to the firm of Thompson & Willey — facts which do not appear — yet he could not, *in equity*, thus charge the partnership fund. Although he and the estate of his deceased partner stood equally liable to the apprehended claim, yet that claim had not been ascertained by any judicial proceeding. On the contrary, the claims of the creditors of the iron company were rendered extremely doubtful, by their having become parties to the assignment, and thereby admitting themselves creditors of the corporation. And suppose the apprehension of liability to so large a claim was a strong motive to some compromise, the parties did not stand upon an equal footing. By making that settlement, and charging that amount to the partnership fund, the whole of the interest of Willey in that fund was absorbed, and his estate could receive no countervailing benefit. But Thompson was enabled to settle the whole concern, without loss; and his share of the charge to the partnership estate of Thompson & Willey was more than counterbalanced by the amount of his commissions under the assignment, in which Willey, after his decease, could not share.

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The strong ground however is, that the surviving partner, through a mere apprehension of liability, had no right to charge the fund with a sum which would absorb the whole of the deceased partner's interest in that fund. It appears to us to stand upon the same footing as if Thompson, without any reference to the assignment, and to the claims and proceedings under it, in consequence of an apprehension that other creditors of the Wareham Iron Company might claim of the old firm of I. & J. Pratt & Co., on the ground of not having given notice of the dissolution, though no judgment was obtained, nor even any suit brought, had agreed to buy his peace by the payment of $29,000 cash. Could he, as surviving partner, have paid such sum in cash, and charged the firm of Thompson & Willey with it, especially when such charge would absorb the whole interest of the deceased partner in that fund? We think it would be extending the power of a surviving partner beyond all bounds of reason and justice. It does not appear that Willey had any other estate to be protected from such charge, by such compromise, except his interest in that partnership. But if he had, Thompson had no authority, as surviving partner, to purchase indemnity for it, by the application of his whole interest in that partnership fund.

But if Thompson could not, for this purpose alone, have paid $29,000 in cash, to purchase such indemnity, without reference to any other consideration, and when he must himself have borne one half of the expense of such compromise, without reference to any corresponding advantage, *a fortiori*, can he not do it, when, as a part of the same general compromise, he obtained countervailing advantages, fully equal to the sacrifice made by such compromise, but a countervailing advantage in which the estate of his deceased partner does not participate.

There are other parts of the executor's account which must be reformed, and it is to be sent to an auditor to be restated.

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Upon the coming in of the auditor's report, the following opinion was delivered by

Shaw, C. J. The effect of the former decision, disallowing a large charge made by the executor against the estate of his testator, for a balance of account, was to change the balance, and to show that the executor was a debtor to the estate. The case was again referred to the auditor, and on his report, it appearing that there is a balance chargeable to the executor, it is objected that, on this appeal, it is not within the jurisdiction of the court to decree that there is a balance due by the executor, but that the matter must be remanded to the probate court, to enable the party who claims so to charge him to begin *de novo*. This is an important question, as it affects the jurisdiction and practice of the probate court, and of this court as the supreme court of probate. The question is, whether, when an executor presents his probate account to the judge for allowance, and there claims a debt as due from his testator to himself personally, or, when persons interested require him to charge himself with a debt due from him personally to his testator, it does not open the whole account between the testator and executor, on both sides, and give the court jurisdiction of the whole subject to decree upon the account according to the result. The court are of opinion that where, as in the present case, such claim is for a balance of account, it does. Whether it would where the claim is on a single specific demand, this case does not require us to give an opinion.

The case where the executor has a demand against his testator is provided for fully by the Rev. Sts. *c.* 66, §§ 18, 19. He, in the first place, charges it as an item in his account, of which notice must be given, and if disputed by any one having a right to dispute it, then it may be submitted to arbitration. It was said, in the argument of this case, that it could not be brought before this court on the appeal, unless it appeared that an arbitration had been tendered and refused. But we think there is no ground for this argument. It is no more the duty of one to offer arbitration than the other. It is

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an authority to the judge, if the parties agree. But § 19 was inserted as a new provision, to supply a defect which formerly existed, in case the parties did not agree to arbitration. It provides that the judge shall decide it, in the first instance, upon the evidence; saving to each party a right of appeal. and providing for a trial by jury, in certain cases, in the appellate court. If it is not required by either party to be tried by jury, nor so directed by the court, it is to be tried here, as below, on the evidence, by the court.

In such case the executor acts *suo jure*, and against the interest of the creditors, legatees, heirs and all persons interested in the estate; whereas, in all other cases, he is trustee for them, and is supposed to be the proper party to defend the estate against groundless and unjust demands. It follows that, in case of his own claim, any party adversely interested may appear and oppose, and in like manner appeal.

So, under another head of authority, the probate court has jurisdiction and power to require an executor or administrator to charge himself with a debt due from himself to the deceased; the same being by law assets in his hands. Every executor and administrator, by taking that trust, subjects himself to the duty of accounting for such debt, and is bound to account on oath, if required, and to answer all pertinent questions which may be put to him touching such debt. *Sigourney* v. *Wetherell*, 6 Met. 553. If such a demand of an executor against his testator, or of an heir against the executor, results from a course of dealing, or involves mutual debts and credits, the balance only is the actual debt, and the judge must examine and pass upon the whole account on both sides, in order to ascertain that balance; and, of course, all the items on both sides are put in issue. *Bigelow* v. *Folger*, 2 Met. 255. This results from the obvious necessity that all mutual demands must be embraced, because the settlement is in its nature final.

It seems, therefore, that upon a claim by either party, all offsets and mutual demands are in issue, and however the court may adjudge the balance, all the mutual claims are em-

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braced in the adjudication. When, therefore, an appeal is taken and entered in this court, the whole case is brought before this court by the appeal. The reason why the widow and heirs took the appeal in the present case, is alleged to be, because they thought the item allowed, which rendered the estate insolvent, ought not to have been allowed. When that is so found in their favor, it seems to us that they are not only entitled to have the claim of the executor disallowed, but to have the whole account reformed and set right on the appeal, and to have a decree accordingly. The authority of the appellate court is, to revise the whole decree, and to pass such decree as the court below might and should have rendered.

Had the executor made no claim against his testator, but simply omitted to credit items which the widow and heirs believed should be credited, the proper course would have been for them to file a petition with the judge of probate, praying that he might be so required to charge himself. That would give the court jurisdiction; and whichever way it might be decided, either party would have a right to appeal. But when the executor made a large personal claim for a balance, and the widow and heirs were called in to answer it, this authorized them to put forth any counter claims, to be used as offsets, or claims upon the executor to charge himself, and thereupon the court of probate had jurisdiction of their mutual claims on both sides, to decree for or against the executor, according to the result. And to the extent to which that court had original jurisdiction, this court has appellate jurisdiction.

It is to be considered that this is not a claim made by the widow and heirs, for any thing due from the executor to them. It is a claim, upon the settlement of his probate account, that he shall charge himself with debts due to his testator, as assets to be accounted for; and to be applied, in due course of administration, to the payment of debts and legacies to the parties entitled.

Field & B. Sumner, for the appellants.

Bartlett & A. H. Fiske, for the appellee.

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Elisha Faxon *vs.* Henry Durant.

A gift of a chattel, accompanied by delivery to the donee, passes the property, as against the donor and his heirs.

A debtor assigned the property described in a schedule, in trust for his creditors, and afterwards delivered to the assignee a chattel not included in the schedule, either knowing that it was not so included therein, or intending, whether it was so included or not, that it should be appropriated to the benefit of his creditors. *Held*, that the property in the chattel passed to the assignee, in trust for the creditors, and that the assignor could not reclaim it.

Trespass for taking and carrying away a silver watch. Trial in the court of common pleas, before *Williams*, C. J.

It appeared at the trial, that the defendant had assigned to the plaintiff, in trust for the defendant's creditors, certain articles of property, by an instrument which contained the following clause: "The said party of the first part" (the defendant) "doth, by these presents, grant, bargain, sell, convey, assign, transfer and set over, unto the said party of the second part," (the plaintiff,) "and his assigns, all the stock in trade, goods, wares and merchandize, debts, choses in action, property and effects, of every description, belonging to him the said party of the first part, or in which he has any right or interest whatsoever, mentioned, contained and referred to in the schedule hereto annexed, marked A, excepting, however, furniture not exceeding in value three hundred dollars." At the end of the said instrument was the following clause: "And it is understood, that any additions, corrections and alterations may be made in the schedule hereto annexed, for the more full and accurate specification of the matters and things therein contained, or intended to be contained."

The evidence tended to prove that the defendant had no copy of said instrument or schedule, and that he, about two months after the execution of the instrument, delivered the watch in question to the plaintiff, saying that it cost him twenty five dollars; that it would not amount to much to his creditors, but that he would give ten dollars for it; that the plaintiff thereupon received it, and made an entry of it in a schedule which he made and kept, in a small book, of goods, &c., as

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they were, from time to time, delivered to him, or came to his possession, under said assignment; that the defendant, thereafter, calling at the plaintiff's store, obtained liberty from him to look at said instrument and schedule, and after looking at them for a while, retook the watch, which was then hanging near, and kept it; for which taking this action was brought.

It also appeared at the trial, that the watch was not mentioned or referred to in the said instrument or schedule.

Upon the foregoing evidence, the court instructed the jury as follows: 1st. That if the defendant, at the time of delivering the watch to the plaintiff, knew that it was not included in the schedule annexed to his assignment, but still intended to deliver it, and did deliver it, for the benefit of his creditors, in the same manner as if it had been included in said schedule, and the plaintiff accepted it for that purpose, the property in the watch passed thereby, and the plaintiff was entitled to recover. 2d. That if the defendant, without reference to said schedule, intended, whether it was included in the schedule or not, to transfer and deliver, and did deliver, the same to the plaintiff, as his assignee, and for the use and benefit of his creditors, and the plaintiff accepted it for their benefit, the property passed to the plaintiff thereby, and he would be entitled to recover. 3d. But if the defendant delivered it under a mistaken belief that it was included in said schedule and assignment, and delivered it merely in execution of his supposed obligation under said assignment, the property therein did not pass thereby, and the retaking by the defendant was rightful, and he was entitled to a verdict.

A verdict was found for the plaintiff, and the defendant alleged exceptions.

Plimpton, for the defendant.

Park, for the plaintiff.

Shaw, C. J. The instruction, we think, was right. A consideration is not necessary to give effect to a gift. A gift of personal property, accompanied by actual delivery, passes the

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property as against the donor and his heirs. 2 Bl. Com. 441. 4 Dane Ab. 123. Whether the watch was embraced in the assignment or not, by referring to the schedule as it was, or as it should be amended, if the debtor gave the watch to the assignee, and delivered it, referring to the assignment, as indicating that he should have the proceeds, in trust for the creditors, the legal property vested in the plaintiff.

Exceptions overruled.

WILLIAM DEHON, Administrator *vs.* CHARLES A. STETSON.

S., of the firm of S., B. & C., gave a note to P. for a debt due from him alone to P.: P. afterwards became indebted to the firm, on account, in a sum larger than the amount of S.'s note to him, and C., one of the firm, requested payment of P., who paid a part thereof to C., saying that he held S.'s note, which he intended to turn in for the balance of the account: C. thereupon told P. that, if S. owed him, all was right; and C. considered it as understood and agreed that the matter was to be arranged as P. had proposed, and so stated to S., who agreed thereto; but no communication on the subject was made to B., nor was the note given up, nor credit given for it in account. *Held*, in a suit by P.'s administrator against S., on the note, that P.'s debt to the firm could not be set off against the note, and that the agreement between C. and P., to which S. assented, was not an accord and satisfaction, nor a payment, nor a substitution of the debt of S. to P. for P.'s debt to the firm, so as to bar the action on the note.

ASSUMPSIT on a note given by the defendant to Stanton Parker, the plaintiff's intestate, on the 26th of November 1836, for $500, payable to said Parker, or order, on demand, with interest. At the trial in the court of common pleas, before *Williams*, C. J. the execution and validity of the note were admitted by the defendant; and he proposed to give in evidence, by way of set-off, or payment, or accord and satisfaction, an account against the plaintiff's intestate, in favor of the defendant and Frederick Boyden and Robert B. Coleman jointly, the balance of which against said intestate was $490·78, in December 1838; which account was duly filed To prove the correctness of said account, and the defendant's right to apply it in set-off, he offered in evidence the deposition of said Coleman; he and Coleman having executed releases to each other.

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Coleman deposed that he, on the 11th of December 1838, presented a bill to Parker (the plaintiff's intestate) for $684, due to the Astor House, in the city of New York, kept by Stetson, Boyden and the deponent; that Parker then said, "I will give you $200, to-day. I hold Mr. Stetson's note for $500, and I intend to turn that in to you for the balance of my account:" That the deponent answered, "I did not know that Mr. Stetson owed you any thing; but if that is so, all is right:" That the deponent considered it fairly understood and agreed upon that it should be so arranged; and that he so stated to Stetson, who agreed thereto. Parker paid $200 on the same day.

No other evidence was offered by the defendant to maintain his defence; and the statements made in said deposition were not controverted by the plaintiff.

The judge instructed the jury, that the facts stated in said deposition were insufficient, in law, to entitle the defendant to a set-off, and that the plaintiff, on these facts, was entitled to a verdict for the full amount of the said note. The jury returned a verdict for the plaintiff, according to said instructions, and the defendant alleged exceptions.

B. Rand, for the defendant. 1. The account should have been allowed as set-off. 2 Stark. Ev. (2d Lond. ed.) 727. *Kinnerley* v. *Hossack*, 2 Taunt. 173. *Wilby* v. *Harris*, 13 Mass. 496. *Wallace* v. *Kelsall*, 7 Mees. & Welsb. 273, per Parke, B. 14 Petersd. Ab. 417.

2. The transaction may be regarded in the light of a payment, or a substitution of the note or debt of Parker for his debt to the defendant and his partners; and in this view it is a bar to this suit. *Hoppe* v. *Symonds*, 2 Chit. R. 324. *Taylor* v. *Hilary*, 1 Crompt. Mees. & Rosc. 741. *Coit* v. *Houston*, 3 Johns. Cas. 249. *Pearson* v. *Pearson*, 5 Barn. & Adolph. 859.

3. The facts amount to a good accord and satisfaction. It was agreed that the note should be received, and the money due thereon be taken, in satisfaction of so much of the account due to the partners. 7 Mees. & Welsb.. 13 Mass. and 2 Taun t.

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ubi sup. *Wilson* v. *Coupland*, 5 Barn. & Ald. 228. *Tibbits* v. *George*, 5 Adolph. & Ellis, 107. *Crowfoot* v. *Gurney*, 9 Bing. 372. *Fairlie* v. *Denton*, 8 Barn. & Cres. 400. *Hodgson* v. *Anderson*, 3 Barn. & Cres. 842. As the note was discharged by the arrangement, so far as Parker's right to claim upon it was concerned, as if it had been actually cancelled, (*Peck* v. *Davis*, 19 Pick. 490,) the accord must be regarded as executed. But if it were to be otherwise regarded, it would come within that class of cases where an unexecuted accord, being upon a new and good consideration, is valid. Com. Dig. Accord, B. 4. *Good* v. *Cheesman*, 2 Barn. & Adolph. 335. *Cartwright* v. *Cooke*, 3 Barn. & Adolph. 703. *Rippinghall* v. *Lloyd*, 5 Barn. & Adolph. 750. *Case* v. *Barber*, T. Ray. 450. *Hillman* v. *Uncles*, Skin. 391.

4. The court erred in directing the jury to find a verdict for the plaintiff, instead of leaving it to them to find for the defendant, if they should, from the facts and circumstances, think that there was an agreement between the parties that the note and debt of the defendant should go and be taken in satisfaction, *pro tanto*, of the joint demand of the defendant and his partners. *Thompson* v. *Percival*, 3 Nev. & Man. 167. *Le Fleming* v. *Simpson*, 1 Man. & Ryl. 269. *Alexander* v. *Barker*, 2 Crompt. & Jerv. 133. *Lord* v. *Wardle*, 3 Bing. N. R. 680.

Dehon, pro se, relied on *Cary* v. *Bancroft*, 14 Pick. 315, and *Fuller* v. *Wright*, 18 Pick. 403.

Hubbard, J. The validity of the note upon which the present action is brought is not denied; but the defendant relies upon the facts offered by him in evidence, as available in defence of the suit, either by way of set-off, or as proof of an agreement that the account of the defendant and his partners should be taken in payment of the note, as far as it would apply; or as a substitution of one contract for the other; or as an accord and satisfaction.

The case has been argued with much ability by the learned counsel for the defendant; but, after a careful examination, we are of opinion that the evidence does not support the prop-

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ositions advanced by him. The defence rests either on the right of set-off, or on proof of an agreement between the parties. The defendant, therefore, must bring his case within the statute, or must establish an agreement to discharge one lebt by the other.

The right of set-off, while it admits the plaintiff's cause of action, permits the defendant to introduce a claim against the plaintiff to meet the demand sued, in whole or in part. This species of defence, which is equitable in its character, is limited, by the statute, to mutual debts or demands between the plaintiff and defendant, and consequently does not embrace a case like the present. The account offered by way of set-off is not that of the defendant solely, but it is the account of himself and two others; and, reversing the situation of the parties, if a suit had been brought upon it against the plaintiff's intestate, the note now in suit could not have been filed in set-off. And the reason is obvious. The contracting parties are different, whichever is plaintiff, and there is, therefore, that want of mutuality which the statute requires; and it is obvious that, if such set-off were allowed, a firm might be made to pay all the private debts of one of the partners. This right of set-off not being matter of agreement, a defence grounded upon it must fail, if not embraced within the provisions of the statute. *Fuller* v. *Wright*, 18 Pick. 403.

The counsel for the defendant, in answer to this objection, has argued, that the case may be brought under the Rev. Sts. c. 96, § 5, on the ground that the partners of the defendant assigned to him the account against the intestate. But such an assignment cannot be inferred from the assent of Stetson that the note might be applied to the account. The assignment must be proved to have been made by the other partners, and there is no evidence to establish it, or from which it can be legally inferred. The authorities cited for the defendant go far to show that an agreement to pay a joint debt, by a separate demand of the debtor against one of the joint creditors, may be sustained, as founded upon mutual promises. *Kinnerley* v. *Hossack*, 2 Taunt. 173, and *Wallace* v. *Kelsall*, 7 Mees. &

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Welsb. 264. 2 Stark. Ev. (2d Lond. ed.) 727. But the evidence in the present case establishes no such agreement. The proof stops short of the point which the defendant must reach, in order to enforce his argument with effect. The evidence is that of a mere intention expressed by Parker, the intestate, of turning his note in for the balance of the account; which was assented to by Coleman, one of the partners, if the fact were so, as all right, and to which, as he testifies, Stetson afterwards agreed; but there is no evidence that the fact was communicated to Boyden, the third partner, or that Parker was told that the note would be received in payment, and that, in consequence thereof, he then concluded a bargain. The proposal was, indeed, satisfactory, but through carelessness or inadvertency, it never ripened into an agreement; it remained to be executed, and it is now too late to enforce it. *Allen* v. *Kimball*, 23 Pick. 473.

The same remarks apply to the positions advanced, that here was the substitution of one contract for the other, or an accord and satisfaction. No such substitution, in fact, took place. There was no satisfaction, no delivery of the note, and no credit given in account. The proposed mode of settlement never was carried into effect, and the parties remained without any change as to their respective rights. We do not see that this case is different in principle from that of *Cary* v. *Bancroft*, 14 Pick. 315, where a similar agreement or proposal was held to be executory, and therefore was not an extinguishment of the smaller demand.

It is urged that there is great equity in the defence by reason of the hardship suffered by the defendant. But even if it were so, (though we do not view it in that light,) the rights of the parties are not thereby altered; and the law must be enforced. Otherwise, cases would be determined without regard to well established principles, and rules of law would yield in all cases of supposed expediency.

It was also contended that the learned judge should have submitted the question to the jury, whether an agreement to pay one demand by the other was made by the parties. But, as

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there were no facts in dispute, it was the appropriate duty of the judge to instruct the jury whether the facts which were proved constituted an agreement, valid in law, between the parties; and his instructions, we think, were correct.

Exceptions overruled.

Henry Winsor *vs.* George Savage.

When A. pays a debt of B., without B.'s previous request, and on informing B. thereof, B. merely asks him why he paid it, he does not ratify the act of A., so as to render himself liable to A. for reimbursement.

was employed by C. to do work on vessels owned jointly by C. and S., and on vessels owned solely by C., and charged the work, on his book, to the respective vessels and owners, and received payments, in part, at different times, from C., but not in settlement of any balance: A. subsequently rendered bills of all the work to C., whose name only was mentioned in the bills, and credited all the payments made by C., leaving a balance in favor of A., for which he refused to receive C.'s note, though offered by C. in payment, lest he should thereby discharge S., and lose his lien on the vessels upon which his work was done: C. was afterwards declared bankrupt, and A. proved his claim against him, for said balance: C.'s assignee brought an action against S. to recover the amount thus paid by C. for S., and while the action was before an auditor, A. executed a release of S., and left it for S. with the auditor. *Held*, in said action, that A. had so far given credit to C. that he could sue C. alone for the work done, and that a discharge of him would be a discharge of S. also; that S. had received his full share of the benefit of the work done by A.; that the proving of A.'s claim on C. for the balance, under the proceedings in bankruptcy, and his release of S. were equivalent to payment by C.; and that S. was liable to C.'s assignee for the amount sued for in the action.

When a part owner of a vessel has a running account with a shipwright who works thereon, and the balance, on settlement, is in favor of such owner, and he receives the shipwright's note for the balance, no interest being charged on either side of the account, and it not appearing that such owner ever paid any money to the shipwright; such owner, in a suit against the other owner for contribution, is not entitled to interest on his account against the shipwright, previously to the time of the settlement of their accounts. But when such part owner gives his notes to the shipwright, payable, with interest, after six months from the times when the work was done, and they are received in discharge of the bills for the work, he is entitled to recover interest of the other owner from the time when such notes became payable, though he did not enter those bills on his book till long afterwards.

When one of two joint owners of vessels and cargoes takes charge of the vessels and their outfits and repairs, and the other attends to the providing of the cargoes and settling for them, and they agree that interest shall be cast on their accounts, the neglect of one of them, for a long time, to render his accounts to the other, though frequently requested, does not deprive him of the right to interest on his accounts when afterwards rendered.

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ASSUMPSIT by the assignee of Henry Curtis, a bankrupt, to recover the balance of an account alleged to be due from the defendant.

The facts of the case sufficiently appear in the opinion of the court.

W. Gray, for the plaintiff.

B. R. Curtis, for the defendant.

HUBBARD, J. This action was referred to an auditor to examine the accounts of the parties, and it now comes before the court, upon his report, to settle certain questions, previously to a final statement of the accounts between Henry Curtis, of whom the plaintiff is assignee, under the United States bankrupt law, and Savage, the defendant. These persons were, for many years, owners in common of sundry vessels, and were also often jointly interested in their cargoes. In the management of their mutual concerns, Curtis took charge of the vessels, and attended to their repairs and outfits, while Savage provided and settled for the cargoes.

Among other persons employed by Curtis in the repair of the vessels, or who furnished supplies for them, were Orrok & Simmons, and Burchsted, Leavitt & Co. Curtis had accounts of his own with them for supplies and work done for him on his separate account; and Savage also, in one instance, had supplies of Orrok & Simmons, on his private account.

In July 1838, Orrok & Simmons presented sundry bills to Curtis for payment, including among them the one for the private account of Savage. Curtis paid all the bills, without examination, thinking, at the time, that only those were presented to him in which he was interested. Afterwards, on examination, he discovered his mistake; but, as he had an outstanding account with Savage, he did not call on Orrok & Simmons to refund. In the course of the same month he mentioned it to the defendant, Savage, who asked him, "why did you pay it?" and there is no evidence that any thing else passed in regard to the matter; but it is admitted that the defendant had in no way authorized the payment, and that no similar transaction had taken place before.

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It has long been settled, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and that no action will lie against him, by reason of such payment, unless his request to do it is proved. But an unauthorized payment may be ratified, and such ratification will be equivalent to an original request. 1 Saund. 264, *note* 1. In the present case, the words made use of, when the fact of payment was communicated to the defendant, are not only no ratification, but, though somewhat equivocal, they rather imply disapprobation. Their meaning might have been indicated by the tone of voice, or the manner in which they were spoken. But we are left without such guides, and must decide on the fact thus nakedly presented. And though the defence appears somewhat harsh, considering the relation of the parties, yet as no request is proved, and no ratification took place, and the defendant, when finally called upon for payment, objected to the allowance and denied his liability to pay, we cannot say that the plaintiff has sustained his claim upon legal grounds, and the item must be disallowed.

The next item of the auditor's report, presented for our consideration, is the amount claimed against the defendant for bills paid Burchsted, Leavitt & Co., for work done, on different vessels owned jointly by Curtis & Savage. The objection to the allowance of these charges is made on the ground that they have not been paid by Curtis, and therefore the plaintiff has no legal right to charge them in account.

The facts, as reported by the auditor, show that Burchsted, Leavitt & Co. were shipwrights, employed by Curtis to work on various vessels, as well those owned by Curtis & Savage, as those in which the defendant (Savage) had no interest. Burchsted, Leavitt & Co. charged their work to the respective vessels and owners, and a credit of six months was given on their bills. Curtis kept a wood wharf, and dealt in wood, coal, timber, hay, &c.; and there was an understanding, if not an agreement, between them, that they should purchase of Curtis such articles as they might want to use in their business to be applied to the payment of the bills for work done on

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essels on which they were employed by Curtis; and, for any balance, they were to be paid by him in cash. The account of Burchsted, Leavitt & Co. commenced in January 1835, and was continued down to March 19th 1842. Bills were from time to time rendered, by them, to Curtis, against the respective "vessels and owners," for work done by them; and payments were made by Curtis, not in settlement of any balance of account, but to such an amount as to approximate towards paying the bills rendered. No settlement of accounts, however, took place between them till April 1842, when the accounts were stated. All the bills rendered by Burchsted, Leavitt & Co. were charged to Curtis, and all the articles furnished and money paid by him were credited to him; and the whole resulted in a balance due to them of $871·03. For this balance Curtis proposed to give his note; but they declined receiving it, on the ground that they might discharge their claim on the defendant, as owner of part of the vessels, and lose their lien on the vessels on which the work had been done.

On the 6th of May 1842, Curtis filed his petition to be declared a bankrupt; and a decree was passed to that effect, July 6th 1842. On the 17th of September 1842, Burchsted, Leavitt & Co. proved their claim, in the district court, for the balance due them; and afterwards, and while the present suit was in progress before the auditor, they executed a release to the defendant, and left it, for him, with the auditor.

It appeared that the last work done by Burchsted, Leavitt & Co. on vessels owned by Curtis & Savage, was prior to August 1839; at which time their account amounted to $3178·86, and Curtis's to $2418·15, both exclusive of interest, leaving a difference of $760·71. This sum was not materially varied afterwards; the difference arising principally from the interest account; the payments by Curtis rather exceeding the work done for him after August 1839.

The defendant contends that this is a question of appropriation of payments made by Curtis, and that the agreement between him and Burchsted, Leavitt & Co., as to the mode

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It has long been settled, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and that no action will lie against him, by reason of such payment, unless his request to do it is proved. But an unauthorized payment may be ratified, and such ratification will be equivalent to an original request. 1 Saund. 264, *note* 1. In the present case, the words made use of, when the fact of payment was communicated to the defendant, are not only no ratification, but, though somewhat equivocal, they rather imply disapprobation. Their meaning might have been indicated by the tone of voice, or the manner in which they were spoken. But we are left without such guides, and must decide on the fact thus nakedly presented. And though the defence appears somewhat harsh, considering the relation of the parties, yet as no request is proved, and no ratification took place, and the defendant, when finally called upon for payment, objected to the allowance and denied his liability to pay, we cannot say that the plaintiff has sustained his claim upon legal grounds, and the item must be disallowed.

The next item of the auditor's report, presented for our consideration, is the amount claimed against the defendant for bills paid Burchsted, Leavitt & Co., for work done, on different vessels owned jointly by Curtis & Savage. The objection to the allowance of these charges is made on the ground that they have not been paid by Curtis, and therefore the plaintiff has no legal right to charge them in account.

The facts, as reported by the auditor, show that Burchsted, Leavitt & Co. were shipwrights employed by Curtis to work on various vessels, as well those owned by Curtis & Savage, as those in which the defendant (Savage) had no interest. Burchsted, Leavitt & Co. delivered their work to the respective vessels and owners, and after the lapse of six months were entitled to their bills. Curtis kept a wharf, and dealt in timber, hay, &c.; and there was an oral agreement, between Curtis & Savage, that his such articles should be applied to

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of paying, has no tendency to make this balance the several debt of Curtis. And it is argued, that the legal presumption must be, that the payments are first to be applied to the individual debts of Curtis, and then to the demands against Curtis & Savage; and that Burchsted, Leavitt & Co. so considered it, when they refused to take Curtis's note in settlement.

On considering the dealings of these parties, from the first to the last, we incline to the opinion that the credit was in fact given to Curtis, although, in point of form, the charges were entered to vessel and owners. Knowing there were other owners, they gave him the credit, rendered to him their bills, and received their pay of him, by agreement, in articles from his wharf, and in money, from time to time. But whether they had any legal claim against Savage, it is not necessary to determine; because we are satisfied that they so far gave credit to Curtis, that they could sue him alone for the work done, and that a discharge to him would be a discharge of Savage also. Upon all the facts presented, we are of opinion that this was work done for Curtis, of which Savage has had his full share of the benefit; that the claim on Curtis for the balance, under the process in bankruptcy, and the release executed by Burchsted, Leavitt & Co. to the defendant, if not a payment in fact of the claim, is equivalent thereto, and that the defendant, therefore, cannot legally object to this branch of Curtis's account. And under the circumstances in which it has arisen, we do not think the question of appropriation of payments is applicable to it.

The defendant objects to the charge of interest on four bills of J. Jones & Son for work on the brig Susan. The bills were settled in April 1842, when the accounts of Curtis were made up. His account exceeded that of Jones & Son, and for the balance they gave their note; but no interest was computed, on either side of the account, on settlement. As no money was paid by Curtis on this account, so far as appears, and no interest raised between the parties, and as the several bills were not settled till 1842, we think no interest account on these charges can be raised against the defendant, till the settlement; at which time the bills must be considered as paid.

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In respect to the objection to the allowance of interest on the bills of Orrok & Simmons, for supplies for the Susan, the facts differ from those in the case of Jones & Son. In the case of these bills, though they were not entered to the defendant, in the books of Curtis, till April 1842, they were settled by his notes, payable, with interest, after six months from the times when the bills were contracted. These notes were received in discharge of those bills, and though not entered in the books of Curtis, there was a right to charge interest, commencing at such settlements, from the fact that the notes were payment. The mere omission to make the entries in the books does not invalidate the claim to interest; but the charges, when entered, relate back to the time of the actual settlement, and interest is to be allowed in conformity.

[The judge here examined the objections of the defendant to the plaintiff's claim of interest in sundry other instances. But as they were all held to be within the rule applied to the bills of Jones & Son, and of Orrok & Simmons, this part of the opinion is omitted.]

A general objection to the interest account is raised by the defendant. The ground stated by his counsel, and urged upon us, why interest should not be allowed to the plaintiff, is, substantially, his laches in not stating and rendering his accounts, after repeated solicitations; and there being no express contract shown, on the defendant's part, to pay interest, the case, it is said, is not within the supposed usage of merchants to allow interest, and so the plaintiff ought to suffer for his neglect.

The case cited, of *Reid* v. *Rensselaer Glass Factory*, 3 Cow. 387, and 5 Cow. 587, was that of an agent who was guilty of neglect in not rendering his account, and to whose administrator interest was refused; and not that of a partner, or of a part owner in vessels and cargoes. The case, we think, rests upon its own peculiar circumstances, and does not bear with much force upon the case at bar. Here, it is evident, from the testimony reported, that there was an understanding between Curtis & Savage that interest should be cast on their accounts.

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This is proved by the testimony of Curtis, by the manner in which Savage kept his side of the account, and by the settlement he made with Curtis in the month of April 1834, in which he states an interest account during the years 1831, 1832 and 1833. In his accounts filed in set-off, he has also either *stated*, or claimed that an interest account *should be stated*, in his favor, and insists upon its allowance, where he can claim it by contract. From these facts we think an agreement to charge and allow interest is proved.

This is a case, then, of parties who are tenants in common of sundry vessels, and joint owners of their cargoes; one attending to the care and management of the vessels, and the other attending to the purchases and sales of the cargoes; each making purchases, procuring work to be done, and paying and receiving moneys on accounts, in which each has a common or joint interest. An agreement is proved between them to keep an interest account. In pursuance of this agreement, one of the parties states his account of purchases and sales, with interest calculated on all the items, and renders it to the other, who allows it and gives his note for the balance with interest. The other neglects to render his accounts, though often urged to make them out, and though offers of assistance were made to him for the purpose. But though the accounts were not made out, the parties continued to transact business, in the same general mode, for several years, and no notice was given by the one to the other that he should not allow interest on his accounts in consequence of his neglect to state and render them; and the accounts were not finally rendered, till the bankruptcy of one of the parties ensued, and his assignee stated them.

No case has been cited to show that, where there exists an agreement between parties to cast interest on their mutual accounts, the right so to do is lost by one of them, from mere neglect. Interest is an incident which accompanies the principal debt, and constitutes a part of it; and payment of it, as it accrues, can only be avoided by tender of the amount of the debt, or balance due, where it is known, or by resort to legal

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process, to ascertain the balance, for the purpose of paying it. If interest once begins to run, it cannot be lost by mere neglect, unless such neglect is so long continued that the principal debt itself is barred also.

In the present instance, Curtis has suffered, probably, much greater inconvenience and loss than the defendant, from not collecting the balance due to him; and the defendant has not shown that he has suffered his money to lie idle, or that he has kept it deposited without interest, lest Curtis should call for payment, and he be unprepared to make it. No injury has been shown by Savage to have been sustained by him, which can, in any way, legally affect the contract between them to allow interest on their accounts. To visit Curtis with such consequences as the loss of interest must occasion, would not only be inequitable, but a departure from their mutual agreement. The defendant's objection to its allowance cannot be sustained.

As the accounts of these parties have neither been balanced nor stated, nor regularly kept, we do not think that annual rests should be allowed, but that interest should be cast on the items of their respective accounts, from the several times of payment up to the date of the final adjustment; making those allowances and deductions, as directed under the several items aforesaid. In the settlement, however, of April 4th 1834, when the defendant rendered his account, up to December 1st 1833, the interest account is not to be disturbed, admitting that the items of the account are correct and the interest properly cast; and upon the note, taken for the balance of that account, interest is to be allowed to the time of the adjustment. Upon the rules now laid down, and the deductions to be made from the plaintiff's claims, the account is to be stated and the interest cast; and the case is to be remitted to the auditor, under these instructions, for his further proceeding and report.

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Thomas Macy & another *vs.* The Whaling Insurance Company.

When underwriters insure the cargo and catchings on board a ship, on a whaling voyage, a letter seasonably written to them by the assured, informing them that the ship is lost by stranding, and tendering an abandonment to them of the interest in the cargo, so far as it has been insured by them, is such an abandonment as entitles the assured to recover for a total loss, if such loss is sustained.

A provision, in a policy of insurance on cargo and catchings, that, if the assured shall have made any prior insurance on the catchings, the underwriters shall be answerable only for so much as the amount of the prior insurance is deficient towards fully covering the property at risk, remains in force after a prior policy, effecting such insurance, is cancelled by agreement of the parties thereto, without the consent of the latter underwriters, although it is cancelled before any loss occurs.

Evidence is admissible to prove a usage, among owners of whale ships and underwriters, to treat a policy of insurance on outfits as covering one quarter part of the catchings.

This was an action of assumpsit, pending in the county of Nantucket, upon a policy of insurance, No. 574, bearing date January 29th 1842, by which the defendants caused the plaintiffs "to be insured, lost or not lost, $10·000 on the cargo and catchings on board the ship Orbit; on a whaling voyage in the Pacific Ocean, or wherever she may cruise for or obtain whales, and until her return to Nantucket; commencing risk May 1st 1841." The policy contained the following clause: "It is hereby agreed that, if the insured shall have made any other insurance upon the catchings aforesaid, prior in date to this policy, the said Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk," &c. The plaintiffs claimed for a total loss.

The parties submitted to the court the following statement of facts: The Orbit sailed from Nantucket, for the Pacific Ocean and wherever she might cruise for whales, on the 11th of August 1839. On the morning of the 7th of June 1842, she was stranded and totally lost, on the coast of Peru, near the port of Payta. Upon receiving intelligence of the disaster, on the 10th of November 1842, the plaintiffs sent to the agent of the defendants, at Nantucket, a communication as follows: "Nantucket, 11th mo. 10, 1842. Frederick C. San-

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ford, Esq. agent of the Whaling Insurance Company at New Bedford. Having received such information as leaves no doubt of the loss of our ship Orbit, on the 7th day of 6th month, 1842, on the coast of Peru, we hereby tender to said company our abandonment of the interest in the cargo of said ship, so far as it has been insured to us by a policy issued by said company, No. 574, and claim as for a total loss.

T. & P. Macy."

On the 1st of August 1839, the plaintiffs obtained insurance for $20·000 "on the ship Orbit and cargo, outfit and catchings, half on each, from Nantucket to the Pacific Ocean and elsewhere, on a whaling voyage, to continue during her stay and cruising, and till her return to Nantucket, with liberty," &c. by a policy issued by the Ocean Insurance Company in Boston. On the 20th of May 1842, this policy was cancelled, and the plaintiffs received a return of part of the premium; but this was done without the knowledge of the present defendants. On the 7th of August 1839, the plaintiffs obtained insurance for $7500 on the ship Orbit, and $7500 on her outfits, for the same voyage, by a policy issued by the Suffolk Insurance Company at Boston.

If the evidence be admissible, (which the plaintiffs deny,) it is agreed that it is the usage among underwriters and owners of whale ships, to treat a policy of insurance on outfits as covering one quarter part of the catchings, and that, by the usage, the term "outfit" includes catchings, to the extent of one quarter of their amount; this amount of catchings replacing and standing in lieu of outfits. It is also agreed, that if the custom shall be considered, by the court, admissible in evidence, and the plaintiffs, or their counsel, shall not be reasonably satisfied of it, that question shall be submitted to a jury.

On the 1st of May 1841, the Orbit had about 600 barrels of oil on board. After that time, and previously to the loss, she obtained 500 or 1000 more. If the parties shall not be able to agree upon the quantity on board at the time of the loss, it shall be determined by an auditor to be appointed by the court.

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When the court shall have determined the true construction and effect of the foregoing policies, the case is to be sent to an auditor, to adjust the loss according to the principles established by the court; and judgment shall be rendered accordingly.

C. G. Loring & Eliot, for the plaintiffs. 1. The abandonment made by the plaintiffs is sufficient to entitle them to recover for a total loss. 2 Marsh. Ins. (3d ed.) 610. 2 Phil. Ins. (2d ed.) 394. *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383. *Murray* v. *Hatch*, 6 Mass. 478. *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 191. *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 604. No adjudged case warrants the dictum in 18 Pick. 93, that a claim for a total loss should be accompanied by a statement of the facts and circumstances, and grounds of the claim. The loss of a whaling ship is almost always a loss of the cargo; and therefore a statement of the loss of the ship as a cause of abandonment is sufficient. If it had turned out that the cargo was safe, the abandonment would have been of no avail. 2 Phil. Ins. (2d ed.) 415.

2. The prior insurance by the Ocean Company does not affect the plaintiffs' rights; because the policy was cancelled before the loss. This fact distinguishes the present case from that of *Seamans* v. *Loring*, 1 Mason, 127. In that case, too. it was a "condition" of the policy, that it should be vacated by prior insurance. Besides; that policy covered only the ship and outfits. Though cargo and catchings are mentioned, yet neither cargo nor catchings existed when the policy was effected; and the ship and outfits were sufficient to cover the sum insured. The insurance did not shift afterwards. Or if it did shift, when, and in what proportions? See *Hill* v. *Patten*, 8 East, 373. *Paddock* v. *Franklin Ins. Co.* 11 Pick. 230. 1 Phil. Ins. (2d ed.) 145.

The insurance of outfits by the Suffolk Company cannot be extended to the cargo; and if it can apply at all to catchings, it can cover only so much as would replace the outfits consumed; and this under an alleged usage.

3. But the alleged usage cannot be invoked into the case.

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Outfits have as definite a meaning as ship, and that meaning cannot be varied by proof of usage. *Blackett* v. *Royal Exchange Assurance Co.* 2 Crompt. & Jerv. 244. *The Reeside*, 2 Sumner, 567. *Rogers* v. *Mechanics Ins. Co.* 1 Story R. 607. *Rankin* v. *American Ins. Co.* 1 Hall, 619. *Eager* v. *Atlas Ins. Co.* 14 Pick. 144. *Hall* v. *Ocean Ins. Co.* 21 Pick. 482. *Strong* v. *Bliss*, 6 Met. 393. 3 Phil. Ev. (4th Amer. ed.) 1415, 1463. In New Bedford policies, express provision is made that "outfits" shall include one quarter of the catchings, &c. This shows that it would not be so, if it were not so provided for in terms.

C. P. Curtis, (*Clifford* was with him,) for the defendants. 1. The plaintiffs cannot recover for a total loss, because their abandonment was insufficient. They stated only the loss of the ship. *Dickey* v. *New York Ins. Co.* 4 Cow. 222. *Suydam* v. *Marine Ins. Co.* 1 Johns. 190, and 2 Johns. 138. *Dorr* v. *N. England Marine Ins. Co.* 4 Mass. 230. *Peirce* v. *Ocean Ins. Co.* 18 Pick. 93. In the case cited for the plaintiffs from 12 Wheat. 383, the question as to the sufficiency of the abandonment seems not to have been decided.

2. The prior insurance by the Ocean Company is to be deducted from the plaintiffs' claim, by the explicit terms of the policy in suit; and *Seamans* v. *Loring*, 1 Mason, 127, is decisive on this point.

3. Evidence of the alleged usage is admissible. 1 Phil. Ins. (2d ed.) 43, *& seq.* *Clark* v. *United F. & M. Ins. Co.* 7 Mass. 369. *Bedford Ins. Co.* v. *Parker*, 2 Pick. 8, 9. *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 387. *Coit* v. *Commercial Ins. Co.* 7 Johns. 385. *Astor* v. *Union Ins. Co.* 7 Cow. 202. *Dow* v. *Whetten*, 8 Wend. 160. *Wadsworth* v. *Pacific Ins. Co.* 4 Wend. 33. *Scott* v. *Bourdillon*, 2 New Rep. 213. *Stewart* v. *Bell*, 5 Barn. & Ald. 238. *Houghton* v. *Gilbart*, 7 Car. & P. 701. *Clayton* v. *Gregson*, 4 Nev. & Man. 602. *Smith* v. *Wilson*, 3 Barn. & Adolph. 728.

Hubbard, J. 1. The first question, upon which we are called to give an opinion, is as to the sufficiency of the abandonment. Intelligence of the loss was received by the plain-

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tiffs about November 10th 1842, and immediately the plaintiffs sent to the agent of the defendants the following abandonment: "Having received such information as leaves no doubt of the loss of our ship Orbit, on the 7th day of 6th month 1842, on the coast of Peru, we hereby tender to said company our abandonment of the interest in the cargo of said ship, so far as it has been insured to us by a policy issued by said company, No. 574, and claim as for a total loss." It is contended that it is insufficient, as it states no loss or damage to the cargo, which is the subject insured; that, although the ship was lost, *non constat* but what the cargo was saved and on its way to the owners.

An abandonment is necessary, in order to the recovery of a total loss, where a part of the subject insured remains and is of any value. This necessity arises from the nature of the contract, as one of indemnity; for it would be manifestly unjust that the assured should recover the whole amount of the property insured, and yet be permitted to retain to his own use the part saved. The practice of abandonment is ancient, but whether it is coeval with the contract of insurance is uncertain. It probably arose with the practice of allowing a recovery of the whole amount of the value of the property insured on losses which were only constructively total. The right of abandonment does not appear to have been the subject of judicial decision prior to the time of Lord Hardwicke, in 1744. *Pringle* v. *Hartley*, 3 Atk. 195. And although important in its character, as it affects the rights of the parties and their interest in the thing saved, yet no form of abandonment has been adopted by underwriters and merchants, or prescribed by law; nor has it been determined that it must necessarily be in writing. No form being given, and the instrument not requiring technical words, it is very clear that any words which directly, and in terms, abandon the property insured to the underwriters, in consequence of a loss by a peril insured against, are sufficient to comply with the provisions of the law. It is true that where the insured abandons distinctly for one cause, (as, for instance, upon a loss by

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seizure or capture,) he cannot, by force of such abandonment, claim a total loss by perils of the sea, or by fire; because the underwriters are entitled to know the cause of abandonment, that they may judge whether to accept or not. But when the insured makes his abandonment, and claims a total loss under the policy, without stating the cause of loss, but refers to the intelligence he has received, the abandonment will not be defective; because the underwriter can call for the information upon which it is grounded, and time will be allowed for the purpose, before he would be required to decide as to his acceptance or refusal. See *Lovering* v. *Mercantile Ins. Co.* 12 Pick. 348.

It is argued, in this case, that the abandonment only communicated the fact of the loss of the ship, saying nothing of the cargo, which was the subject of the insurance, and might have been in safety. It is true that such might have been the fact; and in such an event the underwriter could not have been injured. For if no such loss had taken place, the underwriter would not have been bound by such abandonment; because both the right to abandon and the fact of abandonment must exist together, in order to avail the assured; though it has been held, even that where a previous notice was required, such notice should avail as a continuing abandonment, to take effect at the expiration of the prescribed time. *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383.

In the case before us, the loss of the cargo might well have been inferred from the loss of the ship; and the plaintiffs having, in form, abandoned their interest in the cargo insured by the defendants, with a reference to the intelligence received of the loss, we do not think there is that substantial informality, in not distinctly stating the loss of the cargo with that of the vessel, as to render the act of abandonment invalid.

2. The next question presented for our consideration respects the cancelling of the policy effected with the Ocean Insurance Company. Two reasons are advanced, why it cannot have any bearing on the claim made upon the defendants. 1st. Because it was cancelled prior to the loss of the

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vessel and cargo. 2d. Because the prior policy did not, at the time of loss, attach to the cargo of the Orbit, but only to the vessel and outfits. But this second reason, we think, does not directly meet the true point under consideration. It relates rather to the construction of the prior policy, than to the necessary effect of its cancellation. Passing this over, therefore, we proceed to the first ground of objection, which distinctly raises the question in difference between the parties.

The clause in the policy on the subject of prior insurance is very significant. The language is, "if the insured shall have made any other insurance upon the catchings aforesaid, prior in date to this policy, then the said Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk," &c. If, then, a prior insurance exists, it so far makes a part of the contract between the parties, that, in the event of loss, the insured must first claim of the prior underwriters, and exhaust that policy, before he can resort to the second underwriters. The subsequent insurers, in the event of loss, are interested in a recovery under the prior policy. The risk they take is subordinate to it. The writing of the first policy may have been the very cause of their entering into the contract and assuming the risk, both from their confidence in the judgment of the party taking it, and from the fact that they would stand only in the place of second insurers. The prior policy thus existing is then a part of the new contract, so far as the insured and the new underwriters are concerned, and, being a part of it, cannot be cancelled without mutual consent. It is throwing new responsibilities and burdens on the underwriters, which they never assumed, and makes them liable, and exposes them to injury, in the event of a partial loss, in circumstances under which they never contracted to pay; and it is no answer, to say that the first policy is cancelled prior to the loss. That does not affect the reasoning, nor does it continue the risk of the defendants in the same manner, and to the limited extent,

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in which it existed prior to the cancellation. The relations of the parties are altered injuriously to the second underwriters, without their consent, and the effect is not only to increase the risk directly, but its tendency, if allowed, would be to make the subsequent underwriters insurers of the solvency of the prior; because, on any misfortune happening to the prior underwriters, by which their ability to pay losses should be impaired or destroyed, the party would cancel his policy, to enable him to resort to his subsequent insurers for losses for which they would not be accountable in case of the continuance of the prior policy. The English courts, to which we so often resort for principles to guide us in the determining of questions on the law of insurance, do not give light on this particular case. They have not introduced similar clauses into their insurance contracts. By their policies, the several underwriters are in the nature of co-insurers, and each is liable to contribute a ratable proportion of the loss, either to the assured or to the underwriter who pays more than his proportion. Yet the particular question, what would be the legal bearing upon the other underwriters, in case of loss after a cancellation of one of the policies, upon the same risk, prior to the loss, does not appear to have arisen. Only one case in this country has been cited by the defendants — that of *Seamans* v. *Loring*, 1 Mason, 127; and in that case, it is decided that if prior policies, to the full value of the vessel and cargo, shall have been made, and are in full force when the last policy is written, the underwriters on the last policy are exonerated, although the prior policies shall be all cancelled by a subsequent agreement between the underwriters and the assured, and that, not only before a loss, but before the risk insured had commenced. It is attempted to distinguish that case from the present, because it was there provided in terms, "and it is the *express condition* of this policy that the subscribers hereto shall be discharged from every risk, in case the same property should be wholly assured by any policy or policies, actually prior to this." But the decision of the court does not turn upon the use of the terms "express condition," but upon

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the nature of the contract between the parties; and it is very obvious that the reasons given for the opinion apply, with equal force, to the case at bar. That decision furnishes the authority of an adjudged case in favor of the position, that the cancelling of a prior policy on the same subject matter cannot affect or bind a subsequent underwriter, without his consent. Independently of authority, if the point were wholly new, we should not hesitate, in deciding upon principles important in the administration of insurance law, to come to the same result.

As between the parties to this suit, the policy effected by the plaintiffs at the Ocean Insurance office must be considered in full force, in ascertaining the loss to be borne by the defendants. And when that inquiry is proceeded in, the question will arise, whether the policy made by that company attached to the cargo or catchings.

3. The third question, and a more difficult one, which arises in this case, is, in what manner the loss shall be apportioned among the owners and underwriters; the owners standing in the place of the underwriters at the Ocean office.

The defendants contend that a usage exists among underwriters on whale ships, and their owners, to treat a policy of insurance on outfits as covering one quarter part of the catchings; and that, by the usage, the use of the term "outfits" includes catchings, to the extent of one quarter part of their amount; the same replacing and standing in lieu of outfits.

The subject is not without its difficulties; and this is true of most subjects connected with the usages of trade, till the usage becomes so well established as to form, with all persons thus engaged, a part of the admitted law of the trade. Usages become laws by their frequent repetition, their reasonableness, their adaptation to promote the interests of the parties engaged in the business to which they are applied, and by their common adoption in the community, among those interested. They are, indeed, the results of the sound common sense of practical minds engaged in the same business; each party, whether buyer or seller, giver or receiver, having

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his own, as well as the common advantage in view. But when a question of usage is brought before a court, two inquiries are necessary; the first, as to its nature and extent, and the second, as to its reasonableness. Because a usage, to be binding, must be known and general among those engaged in the business, and received as matter of course. And, to be enforced by law, it must be reasonable in its provisions. For though usages apparently unreasonable may have been so long continued as to have acquired the force of law, yet the unreasonableness, now apparent, may have grown out of changes occurring after the usage was established. But however that may be, when the question is first presented, as to giving legal effect to a usage proved to exist, where its binding force, or proof of its admissibility, is denied by one of the parties to the suit, the court will not enforce it, or give it the sanction of law, unless it be reasonable and convenient, and adapted not only to increase facilities in trade, but to the promoting of just dealings in the intercourse between parties.

In regard to the principles that should govern in settling a question of usage, certain general axioms have been laid down by different judges, which are brought together in our text books, and to which a common assent has been yielded. As to written contracts, it has been held that usage is admissible to explain what is doubtful, but not to contradict that which is plain and free from ambiguity. Otherwise, the parties will be arbitrarily held to mean differently from that which they have written. But while this is true, still evidence is admissible to show that the contract, notwithstanding the common meaning of the language used, was in fact made in reference to the usage in the trade to which the contract relates. *Smith* v. *Wilson*, 3 Barn. & Adolph. 728. The rule of law is well expressed by Starkie, who has collected the authorities. "Where parties have not entered into any express and specific contract, a presumption nevertheless arises that they meant to contract and to deal according to the general usage, practice and understanding, if any such exist, in relation to

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the subject matter. Thus in an action on a policy of insurance, evidence is admissible to show the custom of a particular branch of trade; for every insurer is presumed to be acquainted with the practice of the trade in which he insures although it has been but recently established, and the usage has existed but for a year." 2 Stark. Ev. 453.

These principles, we think, bear on the case before us. The three policies are all upon the round voyage, to the port of discharge in the United States. The first policy is on ship and cargo, outfits and catchings; the second is on ship and outfits; and the third is on the cargo and catchings. And the question is, whether the term "outfits," as used in the second policy, covers the catchings, agreeably to the usage which is alleged to exist, that, in an insurance on outfits, catchings are covered to one fourth part of the amount of the outfits. The word "outfits," in its original use, as applying to ships, embraced those objects connected with a ship, which were necessary for the sailing of her, and without which she would not in fact be navigable. It included the sails and rigging, boats and provisions for the ship's crew; and it has long since been determined that such items enter into the value of the ship, and are covered by an insurance upon her. 1 Phil. Ins. 71, (1st ed.) and authorities there cited. But in ships engaged in whaling voyages, the word has acquired a much more enlarged signification. It has embraced within it not only the ordinary tackle and apparel of the ship, and the provisions for a common voyage from port to port, but the casks and staves, the fishing gear, and the stores and clothing necessary for the successful prosecution of such voyages; articles not for sale, like a common outward cargo of a ship, but for consumption and use during a protracted voyage of years, and for the storing of the cargo or catchings to be obtained. These outfits have their value; and they are converted, either indirectly or directly, into cargo, by their consumption and use in procuring the cargo, and by the taking of the casks for the reception of the oil. In consequence of this, a usage has arisen, in the adjustment of losses with

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underwriters, by which the catchings have been substituted in the place of outfits, to a limited and reasonable extent, and which custom, in New Bedford — the leading port in the world in the great whale fishery — has been introduced into and become a part of the written contract in their policies, to prevent any question as to the binding nature of the usage. "Outfits" is a word, then, of originally limited meaning, as applied to different trades, and in its application to vessels; but it has acquired an enlarged meaning, in the hands of merchants engaged in whaling voyages, adapted to their growing trade; and, as thus used, "outfits" is a word not so clearly defined and strictly limited in its import, nor is it of that plain and decisive character, that we are required necessarily to hold that it is used in policies without reference to an existing custom in this important branch of trade, or that the parties using it intended to confine its application to the outfits as they existed when the ship left her port of departure, and which were changing their character, every day, by consumption and use. The contracts of insurance are inartificial instruments, and the common policy, as used in whaling voyages, is, as to many of its provisions, in no wise applicable to the subject of this particular species of insurance. We are therefore called upon, by the nature of the contract and the character of the extensive trade to which it relates, to give it a liberal construction, in order to do justice between parties. And in view of the subject, as presented to us, we are of opinion that such a usage is reasonable, and that evidence of the existence of it is admissible. Unless the parties shall agree upon the matter, it is to be submitted to a jury to inquire into the existence of such a usage, and whether the parties contracted in reference thereto; and the inquiry will be, whether the usage is general to all who are concerned in the trade, or whether it is a local usage, and confined to the ports of the Commonwealth; and if local, whether the merchants and underwriters in Nantucket and Boston are conversant with it, and practise upon it. And if the jury shall find that such usage is general, or, if local, is in force among the

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persons engaged in the trade, as owners and underwriters, in Nantucket and Boston, as well as at New Bedford, and that it enters into the construction of their contracts, when the word "outfits" is used without explanation, as extending to a portion of the catchings; then the policy effected at the Suffolk office will be held to extend to the catchings, in ascertaining the loss to be paid by these defendants. But if the custom is limited to the port of New Bedford, or is not well known or established in Nantucket and Boston, then it cannot be admitted to affect the construction of the defendants' policy, or to lessen the amount of their contributory share of the loss.

A question has also been started, and may be necessary to be settled, whether the word "cargo" includes within its meaning the outfits, as well as the catchings; and also how far the policy at the Ocean office extended to catchings, while the outfits, sufficient in amount to cover the amount at risk, remained on board the vessel. These are important questions. The word "cargo" is not of such common occurrence in English policies of insurance as with us. They use, in lieu thereof, the words "goods and merchandize." But "cargo" is a word of a large import, and means the lading of the ship, of whatever it consists; and we see not, *in principle*, why it may not cover the outfits, which are goods of value, as well as the "catchings," which is the technical word that includes the blubber taken on board, the oil and the casks. But whether it should be so applied is not free from doubt, because the word "outfits" is so generally used to express the outward lading; from which it may be reasonably inferred that the word "cargo" is limited by the parties to the catchings of the ship. But on this point we do not now feel called upon to express an opinion; as the case may again come before us, when the facts shall be more clearly settled by the further agreement of the parties, or the verdict of a jury. We do not see reason to confine the construction of the policy at the Ocean office to the "outfits," after there have been catchings obtained, until the outfits, to the amount of the sum insured, are exhausted; otherwise, the plaintiffs,

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if no other policy had been effected, would have suffered to a certain extent, if not wholly, their catchings to remain unprotected; which surely was not the design of the contract.

Unless the parties agree, the cause will be sent to a jury, to ascertain the existence of the custom alleged by the defendants, and its nature and extent, as herein stated.

THOMAS J. LEWIS & another *vs.* AARON BROOKS, JR.

The provision in *St.* 1839, *c.* 121, § 1, that, in a suit by an indorsee against the maker of a promissory note payable on demand, "any matter shall be deemed a legal defence, and may be given in evidence accordingly, which would be a legal defence to a suit on the same note, if brought by the promisee," entitles the maker to set off, in such suit, a judgment recovered by him against the promisee.

ASSUMPSIT by the indorsees against the maker of the following note: "April 10 1842. For value received, I promise Erastus Clark to pay him, or his order, six hundred dollars, on demand, with interest. Aaron Brooks, Jr."

The defendant put on file this paper: "In this action, the defendant claims to be allowed the sum due him from one Erastus Clark upon a judgment rendered in favor of said Brooks against said Clark, at June term of the court of common pleas, held at Worcester, within and for the county of Worcester, 1842, for the sum of $685·09, damage, and costs of suit, $7·84." And he accordingly filed, in set-off, a copy of said judgment.

At the trial, in the court of common pleas, before *Williams*, C. J. the plaintiffs introduced the deposition of Erastus Clark, the payee of the note, who deposed to the following effect: That he, (said Clark,) in 1840, bought of Seth Caldwell a farm in Barre, for which he agreed to pay $9000; that he paid $1000, and gave his note for $8000, payable by instalments; that he applied to the defendant whom he owed $70, to lend him $600, which he wished to pay to said Caldwell; that the defendant, not having money, gave the deponent the note

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now in suit, and the deponent gave the defendant a note for the same amount, and secured payment thereof, and of the $70 before due to the defendant, by a mortgage of the deponent's personal property; that he offered the defendant's said note to Caldwell, who refused to receive it as payment of $600, and shortly afterwards sued the deponent and attached the property, which he had mortgaged, as aforesaid, to the defendant, and advertised it for sale; that the defendant gave notice to Caldwell of said mortgage, before the day appointed for the said sale, but that a sale of part of said property was made, without payment of the defendant's demand for securing which it was mortgaged; that Caldwell afterwards obtained judgment against the deponent. in the suit on which said attachment was made, and caused the residue of said attached property to be sold on execution; that the defendant afterwards sued the deponent, and recovered judgment against him on the $600 note, and the $70 debt, for which said mortgage was given; that the defendant afterwards told the deponent that he (the defendant) had sued Caldwell for taking the said mortgaged property, and that Caldwell had settled with him by paying the $70, and giving him an indemnity against his $600 note, now in suit; that the deponent subsequently bought of Seth Holden, who was the agent of the plaintiffs, one undivided half of the right to make and sell, in the State of Illinois, a corn-planter, a machine invented by the plaintiffs, and gave to said Holden, in payment therefor, the said note now in suit, on receiving a deed of said right; having first stated to said Holden the circumstances under which the deponent obtained the note.

The only question raised in the case was, whether the set-off could be allowed. The judge ruled that it could not, and directed a verdict for the plaintiffs for the amount of the note. To this ruling the defendant alleged exceptions.

B. R. Curtis, for the defendant. By *St.* 1839, *c.* 121, § 1, it is provided, that "in any action brought upon a promissory note payable on demand, by any indorsee against the promisor, any matter shall be deemed a legal defence and may be given

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in evidence accordingly, which would be a legal defence to a suit on the same note, if brought by the promisee." Set-off was a "defence," before this statute was passed. *Sargent* v. *Southgate*, 5 Pick. 312. *Ranger* v. *Cary*, 1 Met. 369. *Stowers* v. *Barnard*, 15 Pick. 221. Rev. Sts. *c.* 96, §§ 2, 3. The defendant asks for a strict application of the statute. The equities between the parties cannot come into discussion in this action.

Peabody, for the plaintiffs. The true question is not whether the set-off *can* be allowed, but whether it *ought* to be allowed. An enlarged construction of the law of set-off has been adopted, for the prevention of fraud, and to effect the purposes of justice, so that a debtor may not recover a judgment against his creditor. 1 Met. 375, 376. 5 Pick. 317. To allow the set-off filed in the case at bar would operate unjustly. The *St.* of 1839, *c.* 121, does not enlarge the right of set-off, but merely sanctions the previous decisions of the court. See *Baxter* v. *Little*, 6 Met. 7, and the commissioners' note to § 45 of *c.* 90 of their report.

Hubbard, J. The only question in the present case is, whether the set-off can be allowed. This set-off is a judgment recovered, by the defendant, on a note given by the payee of the note now in suit. The note sued is payable on demand, and is within the purview of *St.* 1839, *c.* 121, § 1, on which the defendant relies. This statute is founded upon the principle of the law merchant, that he who takes a bill or note, after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it; and the question is, whether this provision of the statute is to be restricted to a defence which is either payment or a technical bar to a recovery, or whether it is to receive a liberal construction, so that the defendant may avail himself of a defence in the nature of a set-off, which he could do if the original payee of the note was the plaintiff. It is enacted in the statute respecting set-off, (Rev. Sts. *c.* 96, §§ 1, 2, 4,) that "when there are mutual debts or demands between the plaintiff and defendant in any action, one demand may be

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set off against the other," if such demands are "founded upon a judgment, or upon a contract;" it being a demand which "existed at the time of the commencement of the suit, and then belonged to the defendant."

It is obvious, therefore, that if Clark were the plaintiff in the present suit, the judgment recovered by the defendant against him, might be filed in set-off, as a defence to the action; and such set-off, though not literally a payment of the plaintiff's demand, nor a technical bar to it, would be received as equivalent thereto, and would prevent a recovery of judgment for damages by the plaintiff; admitting the amount of the judgment set off to be equal to the plaintiff's demand.

The statute of 1839, *c.* 121, like the Rev. Sts. *c.* 96, is remedial, and is to receive a liberal construction. And we think that any matter which would constitute a defence, by way of set-off, where the payee is plaintiff, may also be given in evidence by the promisor of a note payable on demand, when an indorsee is plaintiff; and this, whether such defence be made by showing payment, or by way of set-off; and that the words "legal defence" are not to be restricted to the case of payment or of a technical bar. That this construction should be given to the statute, we think may well be argued from the case of *Sargent* v. *Southgate*, 5 Pick. 312, in which it was held that a defendant might file in set-off a negotiable note made to him by the payee of the note in suit, before he had notice of its assignment; a defence which the court deemed both legal and equitable. The statute of 1839, *c.* 121, is, in effect, a legislative sanction of the doctrine maintained in that case. Applying, then, its principles to the present case, we are of opinion that the exceptions must be sustained, and a new trial granted, to let in the evidence. But we would intimate to the parties, that the facts stated in the deposition of Clark go far to prove a payment to Brooks of the note on which he has recovered judgment; and that, if the same has been paid to him, he cannot maintain this defence. In point of fact he appears to be acting for the benefit of a third person

New trial granted.

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Elbridge G. Martin *vs.* John Hilton.

By the Rev. Sts. *c.* 32, the pilotage district, which includes the harbor of Boston, extends from Nahant Rock, on the north, to the highlands of Marshfield, on the south; and the words "port of Boston," or "harbor of Boston," as used in reference to the regulation of pilotage, include all the ports which use the several channels leading to the city of Boston, and the mouths of the rivers which empty into that harbor.

It seems, that it is the duty of the pilots for the harbor of Boston to take charge of a vessel which is subject to the pilotage laws, as well when such vessel is bound to Weymouth, Dorchester, Cambridge, or Charlestown, as when bound to Boston; and that they are entitled to their fees, when they seasonably offer their services to such vessel, and their offer is refused.

The eighth rule for regulating the pilotage of the harbor of Boston, prescribed by the commissioners of pilots, in 1835, was not intended to give, and does not give, the true meaning of the word "harbor," as used in the Rev. Sts. *c.* 32, and as understood by those who navigate the waters of the bay.

In a suit, by a pilot of the harbor of Boston, to recover pilotage fees of the master of a vessel which was subject to the pilotage laws, and bound to Weymouth, and to whom the plaintiff had seasonably offered to pilot the vessel through the waters of his district, and then leave the defendant to take a river pilot, it was *held*, that parol evidence was admissible to show that the waters of the "harbor of Boston" (which was the pilot's district) extended only to the mouths of the rivers emptying into that harbor, and also to show a usage of the pilots, for the last forty years, to pilot vessels, that were to unlade at towns situated on said rivers, as far as the mouths of the rivers, and then leave them to take a river pilot.

This was an action of assumpsit to recover fees of pilotage. At the trial, in the court of common pleas, before *Merrick*, J. the parties agreed upon the following facts: "The plaintiff, being lawfully commissioned as a pilot for the harbor of Boston, and being on the outside or easterly of a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head, being the line fixed by law, (Rev. Sts. *c.* 32, § 24,) hailed the brig Zephyr, she being a foreign vessel, of sufficient burden to make her liable to pay pilotage fees, whereof the defendant was master, and offered his services to pilot said brig into and through the waters of said harbor; and he, the said defendant, refused to receive said pilot on board, in the language following: Pilot hailed. 'Will you take a pilot?' Captain answered, 'yes, if you will take me where I am bound to, Weymouth.' Pilot. 'I will take you through our waters, which is as far as I know, and then you can get a river pilot.' Captain. 'Cannot I make a bargain with you?'

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Pilot. 'No. I shall charge you the Boston pilotage, whether you take me or not.' Captain. 'I will see about that.' The said brig did go through the waters of the harbor of Boston, a distance of about six miles, on her way to Weymouth."

The plaintiff contended that, upon this statement of facts, he was entitled to recover; but the judge ruled otherwise.

The plaintiff then offered evidence of a custom or usage, to explain the eighth rule (recited hereafter, in the opinion of the court,) of the commissioners of pilots, regulating the pilotage of the harbor of Boston; to wit, that the pilots of this harbor had, for the last forty years, piloted vessels that were to unlade their cargoes at the town of Weymouth, and all other towns situated on rivers emptying into the harbor of Boston, as far as the mouths of said rivers, and then left them to take a river pilot; and that the waters of the Boston pilots extended only to the mouths of said rivers. But the judge ruled that this evidence was inadmissible, and rejected it. A verdict was returned for the defendant, and the plaintiff alleged exceptions to said rulings.

Tukey, for the plaintiff.

Wheelock, for the defendant.

The opinion of the court was delivered March 23d 1846.

Hubbard, J. The plaintiff is a branch pilot for the harbor of Boston; and this is an action of assumpsit to recover his fees for offering his services to the defendant to pilot the brig Zephyr, under his command, into that harbor. The brig was a foreign bottom, and subject to the pilotage laws of this Commonwealth. She was bound up Weymouth River, and the plaintiff declined taking her up as far as the master wished to go, but offered to carry her to the place where she might take a river pilot. This the defendant declined, after attempting to make a bargain with the plaintiff, who refused to take the vessel up the river, or to receive less than the Boston pilotage.

In support of his action, the plaintiff contended that his offer was embraced within the provisions of the statute regulating the pilotage of vessels into the harbor of Boston; and he further offered to prove that, for the last forty years, it has

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been the custom or usage of the pilots of Boston harbor, when employed in piloting vessels bound to places situated on rivers emptying into that harbor, to conduct them as far as the mouths of the rivers, and then leave them to take a river pilot; and that the waters of Boston harbor extend only to the mouths of the rivers. The construction contended for, and the evidence offered by the plaintiff, were rejected by the learned judge who presided at the trial, and the defendant had a verdict. And the questions presented for our consideration arise on the correctness of these rulings.

This is an important inquiry, not only as it respects the rights of a most deserving class of our citizens, but as it regards the security of our commerce, which is of increasing value, as well to the neighboring towns communicating with the harbor of Boston by the rivers which discharge into it, as to the city itself.

Although the statute does not make it incumbent on the master of a vessel, subject to pilotage, to receive a pilot, if he chooses to navigate her himself, (Rev. Sts. *c.* 32, § 12,) yet it does not absolve him from liability to pay the full pilotage fees, when the offer of service has been seasonably made. And the master of a vessel, who neglects or refuses to take a pilot on board his vessel, where provision is made for the receiving of pilots, exposes his owners to respond for the damage which may follow from such neglect or refusal. The law merchant acts in unison with the maritime and statute laws relating to pilotage, and, in its beneficial influence, lends its aid to the preservation of the lives and property of citizens that are exposed to the perils of the sea.

Attempts, therefore, to evade the laws securing pilotage to the regular pilots, will be looked upon with a jealous eye, as endangering interests of great value; and the courts are bound to give such a construction to the statute as will best effectuate the intention of the makers.

The defendant contends that his vessel was not bound into the port or harbor of Boston, and that the plaintiff, in offering to pilot her into and through the waters of said harbor, she

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being bound to Weymouth, did not entitle himself to his fees, within the meaning of the statute. In support of this position, the defendant relies particularly upon the case of *Nash* v. *The Schooner Thebes*, decided in the district court of the United States for this district. That was a claim, on the instance side of the court, by a branch pilot for the harbor of Boston, to recover his fees for the offer of service, eastward of the statute line, to pilot the schooner, which was subject to pilotage. The offer was refused, because she was bound from Digby (N. S.) to Lynn, and not to Boston. The libel also contained similar claims for offers of pilotage on subsequent voyages of the same schooner, when bound from Digby to Dorchester, and which offers were refused for the same reason. The learned judge, in coming to the conclusion that the schooner was not bound into the port or harbor of Boston, within the meaning of the law, grounded his reasoning principally upon the construction to be given to the eighth rule of the commissioners of pilots for the harbor of Boston; considering that the revised statutes had neither prescribed the fees nor defined the duties of pilots for the harbor, but had left that to be done by the commissioners, who are authorized to appoint and commission pilots for said harbor, and to make regulations respecting pilotage. Rev. Sts. *c.* 32, §§ 15–22. That rule is as follows: "It shall be the duty of every pilot, after having brought a vessel into the harbor of Boston, to have such vessel properly moored in the stream, or secured to a wharf, at the option of the master, within twenty four hours after the arrival of said vessel, if the weather permits, without extra charge. The pilot, if called upon, after the expiration of twenty four hours from her first anchoring, to haul any vessel into the wharf, shall be entitled to receive three dollars for his services; and a pilot shall be entitled to receive the same for taking a vessel from the wharf into the stream, provided said vessel does not proceed to sea within twenty four hours from the time of her anchoring in the stream."

The learned judge held, that the duty of the pilot, to enti-

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tle him to his fees, was an entire one, including that of securing the vessel to a wharf, or mooring her in the stream, in a place of safety; and that these regulations, which are to be considered as incorporated into the statute, do not contemplate a case in which only a part of the service can be performed in the harbor of Boston, and where it must be completed in another port; and further, that if the track of the schooner, in going to Lynn or Dorchester, would be over waters which might, for any purpose, be deemed within the limits of Boston harbor, yet it did not appear that there was any anchorage, or any place used as a harbor for repose or security, or where a vessel could be moored in safety, in any part of such track; and, consequently, that the passing through a part of the harbor of Boston, in going to Lynn or Dorchester, did not present the case of a vessel bound into the harbor of Boston, so as to entitle the libellant to his fees under the statute. The learned judge also held that, if it were so, a Lynn pilot, duly commissioned by the governor, who should merely conduct a vessel from sea, directly to his own port, would incur the penalty, imposed by § 23 of *c.* 32 of the Rev. Sts. for piloting a vessel into Boston harbor; which section prohibits, with certain exceptions, any person, not having a branch for the harbor of Boston, from piloting vessels into or out of that harbor.

A strict adherence to this decision would be fatal to the plaintiff's claim, in the present suit. But, with the greatest respect for the learning and sound judgment of that court, we are not satisfied with the entire decision; nor do we feel that it is conclusive upon this court in the construction to be given to one of the statutes of the Commonwealth.

In the present case, therefore, it becomes important to ascertain, with some precision, what are the extent and limits of the harbor of Boston, the same not being specifically defined in the statute, and whether parol evidence may not be admitted to prove them.

The pilotage of vessels has been the subject of public interest for more than sixty years past; and the reason assigned in the first statute for its regulation was, that frequent and

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heavy losses had been sustained, and navigation greatly injured, for want of a well regulated pilotage in various harbors of the Commonwealth. *St.* 1783, *c.* 13. This statute continued in force, with occasional modifications, till its revision, with the other statutes of the Commonwealth, in 1836, when all its important provisions were reënacted.

The 32d chapter of the Rev. Sts. § 5, authorizes the governor, with the advice of the council, to appoint pilots for the several harbors and coasts of the State, with the exception of pilots for the harbors and ports of Boston, New Bedford and Fairhaven, for the appointment of which special provisions are made. It then proceeds, in § 8, to constitute several districts of that part of the coast which lies between the Isle of Shoals and the point of Cape Cod, and to each district it assigns pilots. These pilot districts are thus described: "The pilots for the ports of Salem and Marblehead, from Nahant Rock on the south, to Norman's Woe on the north; the pilots for the port of Gloucester, from said Norman's Woe, round the Cape, to Chebacco Bar, so called; the pilots for the port of Newburyport, from Chebacco Bar on the south, to the Isle of Shoals on the north; the pilots of the port of Plymouth, from the highlands of Marshfield on the north, to the point of Cape Cod on the south; the pilots for the coast of Nantucket, to take charge of any vessels on the coasts thereof that shall be bound over the shoals." And, in other sections, further provisions are made for the southern ports of the State.

It is very obvious, from this arrangement, that the district which includes the harbor of Boston extends from Nahant Rock on the north, to the highlands of Marshfield on the south; otherwise, no provision is made for the ports lying within those headlands. And that such is the district is certain, upon reference to the *St.* of 1783, *c.* 13, § 3, in which the several pilot districts were originally designated. That section begins thus: "That the districts of the several pilots be, and they are hereby limited, in manner following, viz. the pilots for the port of Boston, from the highlands of Marshfield on the south, to what is usually called Nahant Rock on

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the north;" and then proceeds, as in the revised statutes. Why this first clause was omitted, in the revision of the statute, is not very apparent, as the revisers, in their notes, propose no alterations. But though the clause is omitted, the construction to be given to the two statutes, as to the districts, is the same.

It may also be observed that the words "port" and "harbor" are commonly used, in both statutes, as synonymous terms; but, in § 4 of the old, and in § 9 of the revised statute, the word "port" is more expressly applied to the particular place named, and "harbor" is used in a more general sense. Those sections provide that each of the branch pilots shall keep one decked boat, and a sufficient number of suitable row boats; and that one of the said decked boats, for the port of Plymouth, shall be stationed in the harbor of Plymouth; two for the port of Salem, in the harbor of Salem, &c. And in the first statute there is the provision, that "one of the boats, for the port of Boston, shall be stationed at the Light House Island;" which clause is omitted in the revised statutes.

The rights of a Boston branch pilot, in demanding the pilotage of vessels into the harbor of Boston, are marked by a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head, to the eastward of which pilots must offer their services, to entitle themselves, as of right, to their fees. Rev. Sts. *c.* 32, § 24. This line, however, is not, that we are aware, coincident with the eastern bounds of the harbor; it being laid down with another intent than to define that bound. The object of the legislature, in drawing it, was to provide for the protection of the shipping, by compelling the pilots to cruise at such a distance from the land as to afford the greatest security to vessels within the bay and inward-bound, and, in describing the line, to select such monuments in the course of it as to prevent disputes between the ship-masters and pilots. This line was prescribed by *St.* 1819, *c.* 45, § 1, which gave full rates of pilotage to branch pilots offering their services before vessels should be to the westward of the said line; and if the pilot offered his services after the

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vessel had passed that line, and before she was to the westward of the light house, (if in Light House Channel,) or before the light house can be seen to westward of the Great Brewster, (if in Broad Sound,) and they were not accepted, he should be entitled to half the usual rates of pilotage. This last provision, as to the inner line, was repealed by *St.* 1829, *c.* 2, §§ 4, 5; and the revised statutes assume the line as laid down in the last mentioned statute.

The term "port" of Boston, or "harbor" of Boston, as thus used in the several acts for the regulation of pilotage, in our judgment, is not satisfied, by restricting its meaning and application to the city of Boston, and to vessels entering its docks and lying at its wharves, or in the stream, between them and the inner islands of the harbor. It is, we think, a term or designation which clearly includes all those ports which use the several channels leading to the city of Boston itself; and this embraces the mouths of the various rivers which empty into the harbor. That it does not extend further, and include other towns on the seaboard, not using these channels, we do not decide; it not being required by the case at bar.

We differ from the restricted construction given to the term "port," or "harbor," of Boston, in the decision relied upon; and we think the error, in that respect, lies in adopting the rule of the commissioners of pilots as giving the true meaning of the term.

The rule or regulation referred to is, in our judgment, drawn with another object, having no design to describe the extent of the harbor of Boston, as intended by the statute, and as understood by those navigating the waters of the bay; but as defining the duties and the rights of pilots, in respect to those vessels bound into, and coming within the limits of, the waters of the city of Boston, with intent there to unlade or to take in cargo. And this, we think, is obvious from all the provisions of the regulation. As to such vessels, we think its terms must be complied with, when not waived, to entitle the pilot to his fees; but that as to vessels bound to ports in the harbor

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of Boston, other than the city, it neither does nor was intended to apply.

As to the argument used, that, upon the enlarged construction contended for in the case of the schooner Thebes, a vessel bound to Lynn might be compelled to take not only a Lynn pilot, but a Boston pilot also, and that a Lynn pilot would be exposed, in conducting a vessel to sea, to the penalty of § 23 of *c.* 32 of the Rev. Sts., we say that we are not aware that any pilots for the port of Lynn have ever been commissioned by the governor, and therefore the case supposed cannot arise. If such pilots should hereafter be appointed, there will probably be such provisions, in relation to their prescribed duties, as will prevent an interference between them and the branch pilots of Boston harbor.

In regard to the evidence which was offered on the trial, and rejected, we think it is competent for the parties to prove, by the testimony of witnesses, what are the limits of the pilotage ground in the harbor of Boston, and whether there exists a custom or usage of the commissioned or branch pilots of that harbor, in piloting vessels to Weymouth and other towns situate on rivers emptying into the harbor, to take them as far as the mouths of the rivers, and there leave them in the care of the masters, or in the custody of the river pilots; or whether it is the usage to take them up the rivers, to the several wharves where they are ultimately to unlade. And it will then appear whether there is suitable anchorage for vessels at the mouths, or in the neighborhood, of the rivers.

The ports within Boston bay are important places. They are within the purview, and entitled to the benefit, of the law providing pilotage for our extended and often dangerous coast. There are no pilots assigned to any of the ports within this bay, besides those commissioned by the trustees of the Boston Marine Society. Rev. Sts. *c.* 32, § 16. And, in our present view of the case, (which may be affected or altered by evidence that may be introduced,) it is as much the duty of these pilots to take the charge of a vessel, subject to the pilotage laws outside the defined line, when bound to Weymouth or

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Dorchester, Cambridge or Charlestown, as when bound to Boston; and the same liabilities for a refusal in such a case would be incurred by them, as if the vessel was sailing directly for Boston; and that they, therefore, have the right to demand their fees, on their offer to pilot being made and refused.

In enumerating these ports, that of Lynn has been designedly omitted, as being a port that may be reached without using the channels leading directly to the city of Boston.

For the reasons stated, we are of opinion that the ruling was erroneous, and that the evidence should have been admitted.

New trial granted.

FRANCIS BARING & others *vs.* EBENEZER CRAFTS.

C. was a joint owner with H. & Co. of the barque Roman, but not a partner in their general business: H. & Co. projected a voyage for the barque, in which they were to be interested in part, and P., as supercargo, in part; and C. afterwards agreed with H & Co. to be interested in one fourth of their part: H. & Co. obtained a letter of credit from B. & Co., of London, through W., their agent in Boston, authorizing P. to value on them, at port or ports in South America, for account of H. & Co. and P., for the cost of any shipments of merchandise made for their joint account, on board the barque Roman, for any sum not exceeding £20,000 sterling, if drawn within six months from date, and if accompanied by bills of lading and invoices of such shipments, consigned to the order of B. & Co.; and H. & Co., at the same time, in their names only, signed an agreement to provide, in London, sufficient funds to meet the payment of whatever might be negotiated by virtue of said letter: When this letter was procured, W. was informed by H. & Co. that C. was interested in the credit and in the voyage. The barque proceeded on her voyage, under written instructions from H. & Co. to P., given with the knowledge of C., recommending that P. should give a decided preference to a hide voyage from South America to Amsterdam, but giving him the entire control of the barque, to go with her, or send her, where he pleased: The barque arrived in South America after the expiration of six months from the date of the letter of credit; and P., finding it difficult to procure hides, loaded the barque with coffee, and proceeded with her to Trieste, consigning the cargo to the order of B. & Co., to whom he forwarded an invoice and bill of lading: To pay for the coffee, P. drew two bills on B. & Co., on different days, one for £10,000, and the other for £7,000, and forwarded advices to H. & Co., who received them after they had suspended payment and assigned their property to C. for the use of their creditors: C. immediately made to H. & Co. a written disclaimer of all interest in the voyage of the barque, denying P.'s authority to purchase the coffee or draw the bills on B. & Co.: H. & Co. ratified P.'s doings, and wrote to B. & Co., urging them to protect the bills drawn by P., but did not give them notice of C.'s disclaimer: The bill for £10,000 was accepted by B. & Co. for the joint account of H. & Co. and P., and the bill for £7,000 was afterwards

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accepted and paid by them, *supra protest*, for the honor of P., the drawer; and they drew on the consignee of the coffee at Trieste for the amount of those bills, and received that amount from him: The proceeds of the coffee fell $21,000 short of said bills, and the consignee redrew on B. & Co. for that sum: In the mean time P. failed, and his property was assigned, under the insolvent law of Massachusetts: B. & Co. presented a claim for said $21,000 against the insolvent estates of H. & Co. and P., and received dividends thereon: The name of C. did not appear in the books of B. & Co., nor in their correspondence with H. & Co., on the subject of the bills and the cargo of coffee: B. & Co. brought an action against C. to recover the residue of the $21,000.

Held, that C. was liable to third persons, as a partner of H. & Co. and P., for all contracts made, in the prosecution of the voyage of the barque, by H. & Co., as superintendents of the voyage, and by P as supercargo, if made within the scope of their authority, although no name, firm, or special designation, was adopted, to distinguish such contracts from the general business done in the name of H. & Co. *Held also*, that P., in drawing the bills on B. & Co., though they were not drawn on the faith of the letter of credit which had expired, acted within the scope of his authority to conduct the voyage and make all contracts incident to its promotion. *Held also*, that C.'s disclaimer to H. & Co., after the purchase of the coffee and the drawing of the bills by P., had no effect on the rights of B. & Co., C. having no authority to revoke the authority of P., after it was executed. *Held also*, that B. & Co., by keeping their books and stating their accounts in the names of H. & Co. only, had not exonerated C. from his liability to them, nor manifested an intention to waive their claim upon him. *Held also*, that C. was liable, as well for the money paid by B. & Co. on the £7,000 bill, as on the other bill, and that they were entitled to judgment against C. for the full amount of the claim made on him.

ASSUMPSIT for the balance of an account alleged to be due to the plaintiffs.

At the trial, before the chief justice, the plaintiffs' counsel opened the case as one of joint liability of the defendant with Elisha Hathaway, Augustus L. Richardson, Elisha Hathaway, jr., and Thomas Popkin, and stated that all except the defendant had been discharged under the insolvent laws of this Commonwealth; dividends having been paid from their estates, which were credited to the account, leaving the balance now claimed of the defendant.

The plaintiffs introduced depositions, from which it appeared that the abovenamed Hathaways and Richardson were partners, from the summer of 1834 to the autumn of 1837, under the firm of E. Hathaway & Co., and that their business was that of commission merchants and ship owners; that the defendant, though not a member of the firm, was part owner of vessels with them, and was occasionally interested with them in voyages and adventures; that Hathaway & Co. and

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the defendant, in 1836, were owners of the barque Roman; that Hathaway & Co. projected a voyage for her to South America, in which they were to be interested to the amount of two thirds, and Thomas Popkin, who was supercargo, was to be interested to the amount of one third; that the defendant became interested with Hathaway & Co. and Popkin to the amount of one fourth of Hathaway & Co's. two thirds; that the letter of instructions, which is copied in the margin,*

* Boston, March 9th 1836. Thomas Popkin, Esq. Dear Sir · According to our agreement, we have prepared the barque Roman for an expedition to South America, of which you are to have the entire management; and we now give a sketch of our ideas upon some parts of the same, as likewise a memorandum of the rates of freight, as agreed upon with you.

We wish you to stop at the Cape de Verd Islands, (the Isle of May is most preferable,) and procure a cargo of salt, for account of owners of the vessel. For the purpose of facilitating you in the purchase, we enclose a letter of introduction from Messrs. E. Train & Co., by means of which you will be able to pass bills on us for the cost.

With this salt it will be best to proceed to Buenos Ayres for a market, and there you will decide upon your plan of operations afterwards. We recommend, however, giving a decided preference to the hide voyage from thence to Amsterdam, but place the vessel entirely under your control, as it is decided upon, that whatever cargo she takes, and wherever she may proceed, two thirds of the same are to be upon account of her owners, and one third for account of yourself, unless the rate of freight received should be equal to or more than is stipulated herein; and in the same proportion, taking all things into consideration, for any other voyages not now alluded to; observing, however, that the rate of freight for cargo home is fixed lower than any other, because that is considered to be only undertaken as a last resort; and it is also understood that, if she come to the United States, she is to be loaded to our address, and to come to Boston, unless great profit is expected to result to the ship from any variation therefrom.

We likewise hand you a letter of credit upon Baring, Brothers & Co., London, for twenty thousand pounds, which will be used for the purchase of the cargo. Perhaps you may wish, as prospects at the River Plate may be bad, to proceed elsewhere for a cargo; and you will understand that we place the vessel under your entire control, to go with her, or send her where you please; having full confidence that you will keep our interest always in view.

The Roman has on board cordage, flour and bread, more than will be required for ship's use. Please sell the surplus when and where you deem best for ship's account; but send us a landing certificate of all the cordage.

Rates of freight agreed upon for the Roman. [Here were inserted the rates of freight for various articles, to various ports.] Demurrage is to be fixed at $35 per day, after allowing a reasonable time at any port, of which two thirds

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was given to Popkin, with the knowledge of the defendant: and that a letter of credit on the plaintiffs (referred to in said instructions) was obtained by Hathaway & Co., as follows: "Boston, March 7th 1836. Mr. Thomas Popkin, of Boston, is hereby authorized to value on Messrs. Baring, Brothers & Co., London, at sixty days' sight, at port or ports in South America, for account of Messrs. E. Hathaway & Co., Boston, and himself, for the cost of any shipments of merchandize made for their joint account, on board the barque Roman, for Europe or the United States, for any sums not exceeding, in all, twenty thousand pounds sterling, and the bills will be duly honored, when presented at the banking house of Messrs. Baring, Brothers & Co., in London, if drawn within six months from this date, and if accompanied by bills of lading and invoices of such shipments, consigned to the order of Messrs. Baring, Brothers & Co. If desirable, the bills for one half of the above credits may be drawn before forwarding the invoices and bills of lading. For Baring, Brothers & Co. T. W. Ward, Atty.:" That the following paper was attached to a copy of the foregoing letter of credit: "Boston, March 7th 1836. Received the original of the above letter of credit for £20,000 sterling. In consideration whereof, we hereby agree with Messrs. Baring, Brothers & Co., to provide, in London,

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are to be borne by the ship, and one third by yourself. On the cost of the cargo you are to receive a commission of two and a half per cent., in addition to the usual commissions; and on the sale in Europe one per cent., in addition to the usual commission.

This voyage is entered upon with particular reference to a cargo of hides from South America to Amsterdam.

You are at liberty to interest us in any operations from South America to this country to our address, to the extent of one third, where you have no interest and to the same extent as yourself, where you have an interest; and likewise in jerked beef from thence to Havana, to the same extent as you interest yourself; the orders for insurance to come to us. And, to facilitate any operations, we hand you a credit upon ourselves.

The commissions in Europe to be earned by you, whether you go with the cargo or not.

Yours respectfully,

E Hathaway & Co

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sufficient funds to meet the payment of whatever may be negotiated by virtue thereof, at the maturity of the bills, and also to give security here for the same, at any time previous thereto, if required by them or their agent. E. Hathaway & Co."

It was in evidence that the barque Roman sailed, soon after said instructions were given to Popkin, for her ports of destination, the Cape de Verd Islands and Montevideo, whence Popkin took her to Rio de Janeiro, where she arrived on the 13th of September 1836, after said letter of credit had expired; that he there purchased a cargo of coffee, and sailed therewith to Trieste; and that, to pay for the coffee, he drew two bills on the plaintiffs, for account of E. Hathaway & Co. and himself — one on the 13th of October 1836, for £10,000, and one on the 21st of said October, for £7,000 — which bills were the basis of the account in suit: That E. Hathaway & Co. stopped payment on the 7th of November 1836, and on that day made an assignment of their property to Crafts, the defendant, for the use of their creditors, under St. 1836, c. 238, by an indenture tripartite, executed by them, of the first part, said Crafts, of the second part, and said creditors, of the third part: That, on the 22d of said November, the plaintiffs, in London, accepted the said bill of £10,000, for the joint account of E. Hathaway & Co. and Popkin: That, on the 5th of December 1836, advices were received at Boston of the purchase of said coffee, and the drawing of said bills; and the defendant thereupon directed and delivered to E. Hathaway & Co. the following letter: "Gentlemen. Having learned from you that Mr. Thomas Popkin has concluded to load the barque Roman with coffee at Rio de Janeiro for Trieste, and as he has, in my opinion, no authority to justify him in undertaking any operation of the kind, for account of the owners of the Roman, under the instructions and credit given him by you, as ship's agent, at the time of his leaving Boston, I hereby relinquish to yourselves, or Mr. Popkin, or whomever it may concern, all my right, title and interest, to any share in the aforesaid cargo of coffee, and shall not consider

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myself bound for any loss which may arise from said operation, and give up the use of my share of said vessel, from the time of entering upon the operation, until she is discharged and freed from the same at Trieste and ready for other business; denying, fully and entirely, the authority of Mr. Popkin, or any other person, to interest me in the same. Eben. Crafts:" That this disclaimer was not made known to the plaintiffs: That E. Hathaway & Co. ratified the aforesaid doings of Popkin, and wrote to the plaintiffs, under date of December 5th, urging them to protect Popkin's bills: That Popkin went to Trieste with the cargo of coffee, for the purpose of advising and assisting in the sale thereof: That the plaintiffs, on the 9th of January 1837, accepted the bill of £7,000, *supra protest*, for the honor and on account of Popkin, the drawer, and informed Hathaway & Co. of this fact, by letter dated the 14th of said January: That the plaintiffs, on the 15th of March 1837, paid said bill, according to their acceptance, declaring (as the notary certified) that they, nevertheless, held "the said drawer, and all others whom it might concern, in and by said bill, responsible, always obliged to them for reimbursement:" That the plaintiffs, in January and April 1837, anticipated the proceeds of said coffee, by drafts on the consignees at Trieste; and that, as the proceeds ultimately fell short of those drafts, by about $21,000, the consignees redrew, for this deficiency, on the plaintiffs, who afterwards presented a claim for this amount against the insolvent estates of E. Hathaway & Co. and of Popkin, and received dividends thereon: That Crafts, the defendant, as assignee (as before mentioned) of E. Hathaway & Co., paid to the plaintiffs' agent two dividends on their said claim, one in June 1838, and one on the 20th of December 1838: That the plaintiffs' said claim was presented to the defendant, as said assignee, in March 1838, in the form of an account against "the owners of the barque Roman."

It also appeared, that in the invoices and documents, in the plaintiffs' books, in the statement of their accounts, and in

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their correspondence, the names of Hathaway & Co. only were used.

T. W. Ward, the plaintiffs' agent, testified that when he gave the letter of credit, on the 7th of March 1836, it was stated to him by Richardson, who applied therefor, that the defendant was to be interested in the credit and in the voyage; and that, after advices were received from Popkin that he had drawn on the plaintiffs, E. Hathaway, sen. called on the witness several times, and very strongly urged him to have the bills accepted; that the witness called at the office of Hathaway & Co., where Hathaway, sen. and Richardson stated to him, "as a reason for the plaintiffs' safety in accepting the bills, that Mr. Crafts was responsible for them, and was interested in the cargo." The witness also testified that "they gave other reasons — such as Popkin's being also concerned. But this of Mr. Crafts' being concerned was one of them." This witness further testified, that he wrote to the plaintiffs, and stated the case of these bills, and that he thought the plaintiffs "would be safe if they did accept them, inasmuch as Popkin and Crafts were both interested and responsible, and also as Crafts was assignee of Hathaway & Co., and as Crafts was also concerned in another voyage." But E. Hathaway, jr. and A. L. Richardson testified, that they had no recollection of stating to Ward, or of having heard it stated to him, after they had knowledge of the purchase of the coffee and the drawing of the bills by Popkin, that the defendant was interested in the coffee, or liable to pay the bills. And the plaintiffs' counsel admitted that E. Hathaway, sen. would testify, if he were present, in the same manner. Said Richardson also testified, that he said to Popkin, at or just after the time of delivering the letter of instructions to him, "do not touch coffee, unless exceedingly low," or words to that effect.

Popkin testified that he did not engage in the hide voyage, on account of the difficulty of procuring hides, and the high price of them; that he considered hides as only one object of the voyage, and did what he thought best in respect to the

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voyage; that the credit expired before the bills were drawn, by reason of the outward voyage being protracted; that one cause of the protraction of the voyage was, that he took a large number of shipwrecked passengers from Salt Island to Montevideo, for whom $6,000 passage money was received.

The parties also introduced the correspondence between them, the letters of advice from Popkin to the plaintiffs, the invoices, and various other documents. And it was agreed to take the case from the jury, and submit it to the decision of the court, upon the evidence; the court to draw such inferences as a jury would be warranted in drawing, and to order a nonsuit, or a default and judgment for the plaintiffs for what sum should be due from the defendant.

This case was argued in February 1844.

C. P. Curtis & B. R. Curtis, for the plaintiffs. When the letter of credit was granted, the defendant was concerned, jointly with Hathaway & Co. and Popkin, in the business for which that letter was obtained. In this business, the names of Hathaway & Co. embraced and designated the defendant. Ward, when he granted the letter, was informed of the fact that the defendant was interested, and must have relied on the defendant's liability. Parties are held by any name which they use. *Etheridge* v. *Binney*, 9 Pick. 272. *Ex parte Gellar*, 1 Rose, 297. *Trueman* v. *Loder*, 11 Adolph. & Ellis, 594. The letter of instructions was the basis of all the subsequent movements in the voyage. As the names of Hathaway & Co., in that letter, designated the defendant, so the same names, used in the invoices, &c., and in the plaintiffs' books, also designated him. This view is confirmed by the fact, that the plaintiffs were advised by Ward that they might safely accept the bills after the six months had elapsed, and that this advice was given to them because Hathaway & Co. had declared that the defendant was liable. And as the defendant had agreed to be interested in the voyage which stood in the name of Hathaway & Co., he is bound by what they said to Ward.

The coffee was so purchased as to make the defendant in-

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terested therein as a partner. The letter of instructions to Popkin was such as requires to be liberally construed; and as he acted *bonâ fide*, and within the supposed limits of his authority as agent, his principals are bound by his acts. Story on Agency, §§ 74, 75, 82. Besides; Popkin was not a mere agent, with a naked authority, but was a partner; and therefore was not, like such agent, bound to regard the strongly expressed wishes of Hathaway & Co. as positive orders. *Brown* v. *M'Gran*, 14 Pet. 494. But the conclusive consideration is, that the vessel was put under his entire control, with liberty to take some other cargo than of hides, if the "prospects" of a hide voyage should "be bad."

The defendant cannot avail himself of the fact, that the time expressed in the letter of credit had expired. Story on Agency, § 85. *Parkhill* v. *Imlay*, 15 Wend. 431. Popkin's general authority to go where he pleased would seem to authorize him to draw after six months. His letter of instructions did not restrict him to any particular mode of raising funds. See *Dusar* v. *Perit*, 4 Binn. 361. *Drummond* v. *Wood*, 2 Caines,.310. *Day* v. *Noble*, 2 Pick. 615. *Judson* v. *Sturges*, 5 Day, 556. Nor can the defendant's disclaimer to Hathaway & Co. avail him. He was a dormant partner, and could not withdraw without notice to those who knew him to be such partner. *Evans* v. *Drummond*, 4 Esp. R. 89. *Carter* v. *Whalley*, 1 Barn. & Adolph. 11. Gow on Part. (1st Amer. ed.) 261. Collyer on Part. 62. After a transaction is pending, such partner cannot withdraw, even with notice. The defendant, by paying dividends, as assignee of Hathaway & Co., on the account against "the owners of the barque Roman," of which he was one, acquiesced in the making up of the account in that manner, and acknowledged his own liability.

C. G. Loring & Dehon, for the defendant. There was not, originally, any contract between the defendant and the plaintiffs, concerning the voyage of the Roman, or the bills drawn by Popkin, or the letter of credit upon which the voyage was undertaken; but the plaintiffs originally contracted with Hathaway & Co. and Popkin only. *French* v. *Price*, 24 Pick.

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19. *James* v. *Bixby*, 11 Mass. 34. *Sylvester* v. *Smith*, 9 Mass. 119. *Cox* v. *Reid*, 1 Car. & P. 602. *Loyd* v. *Freshfield*, 2 Car. & P. 325. *Bank of U. States* v. *Binney*, 5 Mason, 176. Story on Part. §§ 134, 140. Though Ward was informed that the defendant was interested, yet he chose to issue the letter of credit to Hathaway & Co. and Popkin, and to take the stipulation of Hathaway & Co. to remit for payment of the bills that might be drawn.

If there were originally any such contract, so that the defendant would have been liable on account of bills drawn within the time of the credit, yet Popkin had no authority to draw after the expiration of the time; and so the bills were unauthorized and not binding on the defendant, and were never assented to or adopted by him, but were, on the contrary, expressly disaffirmed and repudiated. Story on Part. §§ 334, 406–408, 417, 418. *Clement* v. *Dickey*, Paine, 377.

If Popkin had authority to draw the bills, and if the plaintiffs might have accepted them on account of the defendant as jointly liable with Popkin and Hathaway & Co., yet the bills were not accepted and paid on the joint account or credit of the defendant with them, but solely upon the account and credit of Hathaway & Co. and Popkin; and the plaintiffs, having originally elected to look to them only, cannot now claim of the defendant.

The acceptance of the bill for £7000, *supra protest*, for the honor of Popkin, the drawer, confines the plaintiffs' remedy, on that bill, to him alone.

Shaw, C. J. This case having been submitted to the court, upon the facts as well as the law, upon a mass of written and oral evidence, it is difficult distinctly to separate and state the points of law decided.

The question is, whether the defendant was jointly liable with E. Hathaway & Co. and Thomas Popkin, for the plaintiffs' balance of account; all the other parties having been discharged under the insolvent laws.

It is admitted or proved, that E. Hathaway & Co. (Hathaway, Hathaway, jun. and Richardson) were general partners

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that the defendant was part owner of vessels with them, not a partner in their general business, but occasionally interested, by particular agreement, in particular voyages and adventures; that he was part owner of the barque Roman; that a voyage was proposed by Hathaway & Co., for that barque, to South America; that Popkin was to be supercargo, and to be jointly interested one third in the voyage; and by agreement between Hathaway & Co. and the defendant, the latter was to be interested with them to the extent of one quarter of their two thirds.

This agreement to share profit and loss rendered the defendant liable to answer jointly, as a partner, so far as third persons were concerned, for all contracts and undertakings made in the prosecution of the voyage, although no name, firm, or special designation was adopted to distinguish such transaction from the general business done in the name of E. Hathaway & Co. This firm, having the general superintendence of the voyage here, and Popkin being supercargo, to conduct the business abroad, the defendant was bound by their respective acts as such agents, so far as they acted within the scope of their authority.

It appears further proved, and is an admitted fact, that at the outset of this voyage, it was to be conducted mainly by means of a letter of credit, for £20,000 sterling, obtained by Hathaway & Co. of the plaintiffs, through T. W. Ward, their agent in Boston. Such letter of credit authorized Popkin to draw bills to the amount specified, on condition of being so drawn within six months from date. Hathaway & Co. then gave an obligation to the plaintiffs, to provide funds for the payment of such bills. It is contended that the defendant is not liable for these bills, because, although he was known to be interested, he did not join in this contract of Hathaway & Co. Without stopping to consider whether this was within the scope of their authority to conduct the voyage and make all contracts incident to its prosecution, and whether the defendant would not have been bound by their act done as such agents; the answer is, we think, that the bills afterwards

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drawn by Popkin were not drawn on this credit; that the term of credit had expired, and the plaintiffs were no longer bound by that undertaking, to accept his bills. The defendant's liability, then, if it existed, did not depend on the contract of Hathaway & Co., made in reference to that letter of credit. It depends upon the question, whether Popkin acted within the scope of his authority, as the agent of the joint concern, in drawing the bills in question. The defendant denies that Popkin was so authorized.

It appears by the letter of instructions given by Hathaway & Co. to Popkin, that they did not place any restraint or limitation on his authority, and that he did carry the credit of the owners with him. Thus, though they strongly recommended a hide voyage, and contemplated that as one of the objects of the adventure, they still left it to his judgment; and when Richardson cautioned him against coffee, it was with the qualification, *unless he should find*, &c., implying that it was advisory and not intended as a restriction of his authority.

Suppose then, as his right to draw on Baring, Brothers & Co. had expired, instead of doing so, he had found a house willing to sell him a cargo of coffee on the credit of the concern; would not the defendant have been bound as a partner by such contract? He was to share profit and loss; the contract was for him, and would enure to his use and benefit; and therefore, by the well known rule of law, we think he would have been liable as a partner. Whatever may be the agreement of the parties among themselves, the law makes such parties liable, as partners, to a third person who deals with them, and a joint action will lie. It is founded on the principle that they all share in the profit. And it seems immaterial what is the particular mode of taking the credit or making the contract.

And so it seems that the defendant's disclaimer, after he was informed that the cargo of coffee had been purchased, and the bills drawn, could not have any effect on the rights of third persons. The letter of instructions to Popkin

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was an open letter, to be carried with him, as evidence of the authority given him by the owners. If that authority enabled him to bind the owners, and he acted upon it, they must stand bound, as to third persons, although the defendant had some understanding or agreement with his associates, that he was not to be bound, unless in a particular voyage or adventure. He could not restrain the authority of the supercargo by such private agreement, nor could he revoke it after it was executed.

The remaining important question is, whether, in the mode of keeping their books or stating their accounts, the plaintiffs have waived their right of charging the defendant — supposing him liable — or have exonerated him by any subsequent act.

When parties agree to transact business jointly, or under an agreement to share in the profits, the name or firm which they use is arbitrary and conventional. They may use the name of both, or of one of them alone, or any distinct designation by which all will be included and bound, as if their names were used. *Manufacturers & Mechanics Bank* v. *Winship*, 5 Pick. 11. *Etheridge* v. *Binney*, 9 Pick. 272. And when the joint dealing is confined to one transaction, and is conducted by one of the parties, by agreement or mutual understanding, a contract entered into in such name, and with reference to such interest and dealing, is binding as well on the party not named as on the party whose name is used. We think, therefore, that as Crafts, the defendant, by agreeing to take a joint interest with Hathaway & Co., and to share profit and loss with them, by operation of law became liable, jointly with them, to third persons, and as no other name or designation was adopted than that of E. Hathaway & Co., and that designation was used in the instructions, invoices and documents, the plaintiffs, in dealing with such joint concern, and using such name, waived no claim which the law gave them, against the defendant, on his joint liability, by not inserting his name in the accounts. So, if the name E. Hathaway & Co., as a name of firm, once bound the de-

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fendant, because it in effect embraced his name and liability the same name must continue to bind him, till some notice of change. *Trueman* v. *Loder*, 11 Adolph. & Ellis, 589, and cases there cited. So the manner in which the plaintiffs stated the account in their books would not discharge their claim if it had once existed. *Barker* v. *Blake*, 11 Mass. 16. In that case, the particular account had been credited, and the account charged, to one of the partners; but the court held that the creditor did not thereby discharge his claim against the partners. In the case at bar, the keeping of the books and accounts in the name of E. Hathaway & Co., under the circumstances stated, cannot be construed into an intent to exonerate the defendant, and look to the credit of Hathaway & Co. alone. And we can perceive no other evidence tending to show that, if the defendant was originally liable to them, they have done any thing manifesting an intention to waive such claim, or discharge such liability. If he was bound, it was a legal liability in consequence of his being jointly concerned in the voyage; not from the use of his name, nor because he had held himself out, or permitted himself to be held out, as one to whom credit was given. Keeping the account without inserting his name is no evidence, therefore, of an intent to renounce his liability. When the plaintiffs came to make out the account, with a view to assert their rights, they made it to the owners of the barque Roman, so as to charge the persons liable, whoever they might be.

It was insisted by the plaintiffs' counsel, that the defendant had assented to this statement of the account, in such a manner as to amount to an acquiescence on his part. The fact upon which this argument was raised is this: that the defendant was assignee, under a commission of insolvency, of some of the parties; that the plaintiffs had presented to him their account, charging the owners of the barque Roman; and that he, by receiving it without objection, and paying money upon it, had assented to it. We think there is little weight in the argument; and we lay no stress upon this circumstance. The account was presented to the defendant as

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assignee. The particular form of it probably did not attrac his attention; and his payments upon it were made from the funds of the insolvent house, who were chargeable at all events.

A question was made, whether any distinction could be taken between the bill for £10,000 and the bill for £7000, on the ground that the latter was accepted by the plaintiffs, *supra protest*, for the honor of Popkin, the drawer. Why this bill was so accepted does not distinctly appear. The main reliance of the plaintiffs, for their reimbursement, seems to have been upon the proceeds of the coffee, pledged for the payment of the bills; and as Popkin accompanied the property to Trieste, to advise and assist in the sale of it, possibly they might consider such acceptance as giving them a more distinct personal claim as against him, inducing him to attend with more zeal and care to their interests. But we do not perceive that this can make any difference. The defendant is not chargeable as a party to this bill, and would not have been so in any mode of accepting it by the plaintiffs. The bill was only the means by which the money was raised by a party authorized to act as the agent of the concern. Suppose Popkin had paid the bill himself; as, being a party, he was bound to do. So far as he was not reimbursed by the proceeds of the coffee, it would have been money paid for the use of the concern, for which they would be liable to him. Then if, under his authority, not only as agent and manager of the joint concern abroad, but being himself one of the joint adventurers, he engaged the plaintiffs to pay the money for them and receive the proceeds, and these proved insufficient, the plaintiffs became creditors for the balance to the parties jointly responsible.

But further; after Hathaway & Co. knew that the bills had not been drawn within the time limited, and of course that Baring, Brothers & Co. were not bound to accept and pay them according to the terms of their letter of credit, they wrote to the plaintiffs, requesting them to protect these bills. On the payment of the bill of £7000, which had been

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accepted for the honor of Popkin, the drawer, they take care to say that they hold Popkin, *and all other persons, &c.*, liable to them for the amount. Now, even if they would not, on general grounds, have a right to charge to Hathaway & Co. the money paid on that bill, because accepted specially for the honor of the drawer; still, after receiving that letter, they were justified in reinstating that charge in the account, as a good charge against the joint concern, and as so much money paid on their account. And whether Hathaway & Co. had received the disclaimer of Crafts, the defendant, or not; or whether, as between him and them, he had a right to disclaim his liability, or revoke their authority to act for the concern; it is obvious that he did not communicate notice of any such fact to the plaintiffs; and as Hathaway & Co. had, by the original agreement, power to act for the concern, this request from them, to pay the bills generally, bound all the parties concerned, and placed them upon the same footing as if the bills had been drawn specifically on account of the owners of the barque Roman. We think, therefore, that no distinction can be made between the bill accepted for the honor of Popkin, the drawer, and the bill accepted generally.

Judgment for the plaintiffs

EBENEZER E. DYER *vs.* SAMUEL SANFORD.

An easement cannot be extinguished or renounced by a parol agrèement between the owner of the dominant and the servient tenement.

A license, given by the owner of the dominant to the owner of the servient tenement, to obstruct an easement, is not revocable after it is executed, and may operate as an abandonment of the easement, to the extent of such license.

The owner of a dominant tenement may make such changes in the use and condition of his estate as to renounce the easement; and this may be relied on, by the owner of the servient tenement, as an abandonment thereof: But, in order to prove such abandonment, it must be shown that the acts relied on were done voluntarily by the owner of the inheritance, who had authority to bind the estate by his grant or release, and were of so decisive and conclusive a character as to prove his intention to abandon the easement.

A. conveyed to B., in 1799, land and a new house thereon, bounding said land northerly on the estate of D.: B.'s administrator conveyed to D. a narrow piece of B.'s land

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adjoining the land of D., "reserving to the house of B. the right of eaves-drops where it bounds on said lot, and also the right of forever keeping open the staircase window at the back of said house, bounding on said lot," said window being twenty-five inches distant from the line of D.'s land, as it stood before said narrow piece was conveyed to D.: The widow of B., having a right of dower in his said estate, and being in the occupation thereof, afterwards gave a parol license to D. to stop up said window, and he accordingly did so: The devisees of D., in 1805, conveyed his estate to I., by deed of warranty, "subject to the reservations expressed in the deed of B.'s administrator to D., of the right of eaves-drops, where the estate late of B. bounds on the land sold by said administrator to D., and the right of forever keeping open the staircase window at the back of the house bounding on said land:" In 1836, the estate of B. was conveyed to E.: In 1831, W., who then owned D.'s estate, partially obstructed said window; and it remained so obstructed for two or three years, when W. sold said estate, which was afterwards conveyed to S., who, in 1841, wholly obstructed the entrance of light and air through said window, and cut off the eaves of said house, by building up a brick wall on the line of his (S.'s) land; and E. brought an action against him to recover damages therefor. *Held*, that the easements reserved in the deed from B.'s administrator to D. were not extinguished, renounced or abandoned, by the license given by B.'s widow, and the acts of D. & W. *Held also*, that the reservation in the deed from D.'s devisees to I. precluded S., who was privy in estate with I. from setting up said license. *Held also*, that the reservation, in the deed of B.'s administrator to D., of the right of keeping open the window, was merely a right then existing, to wit, the right to light and air coming from the space of twenty five inches between the window and the line of D.'s land as it stood before that deed was given, and that E. was not entitled to recover damages of S. for any obstruction of the light and air by an erection on the original line of D.'s land.

In an action of trespass upon the case, the plaintiff alleged, in his first count, that before and on the first day of April 1841, he was possessed of a dwelling-house, situate on the westerly side of Atkinson Street, in Boston, in which house there was, and still of right ought to be, a large staircase window, through which the light and air ought to have entered, and still ought to enter, for the convenient and wholesome use and enjoyment of said house; but that the defendant, on said day, wrongfully erected a brick wall and building near to said window, and continued the same, so erected, to the day of the date of the plaintiff's writ; whereby said house was darkened, and the light and air prevented from entering through said window. In the second count, it was alleged that the defendant, on said 1st of April, wrongfully destroyed the eaves on the northerly side of the house mentioned in the first count, and built a brick wall so nigh to the northerly wall of said house, as to prevent the plaintiff from having the means of conducting the water, falling upon the roof of said

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house, from the said northerly wall thereof; whereby the said house was injured, and the cellar thereunder and the walls thereof were wet and injured, so that said house was made uncomfortable, unwholesome, and unfit for occupation.

The trial was before *Wilde*, J. who made the following report thereof: The plaintiff, to sustain his claim, introduced a deed of the estate in question, dated June 5th 1799, from Mary Rand to Christopher Tilden, bounding it northerly on the estate of Thomas Davis; also a deed from Nathaniel T. Tilden, administrator of the estate of Christopher Tilden, to said Thomas Davis, dated November 23d 1802, and recorded on the 5th of January 1803, by which said administrator, under license, sold and conveyed to said Davis a gore or strip of the land of said Tilden deceased, adjoining the estate of said Davis, which strip was one foot wide on Atkinson Street, and four feet wide in the rear, and in which deed was this reservation, viz. "reserving, however, to the dwelling-house of said deceased, Christopher Tilden, the right of eaves-drops where it bounds on said lot, and also the right of forever keeping open the great staircase window at the back of said house, bounding on said lot." It was in evidence that the window thus mentioned was in the back part of the house of said Tilden, and twenty five inches distant from the line of the estate of said Davis, as it stood before this conveyance. The house of said Tilden was not shown to have been erected earlier than the year 1799.

The plaintiff also read in evidence a deed from George Sullivan, administrator *de bonis non* of said Christopher Tilden, dated October 1819, by which, under an alleged license, he sold to James Dalton "all the right, title and interest, that Christopher Tilden had, at the time of his decease, in and to the land and dwelling-house, as the same is now marked by fences and the line of the house aforesaid and buildings next to the adjacent lands; the same being now as they have been for some years, particularly during the occupancy of Mrs. Elizabeth Tilden, the widow of said Christopher; with the privileges and appurtenances thereto belonging." The plain-

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tiff then put in a deed, from James Dalton to Peter R. Dalton, of the same premises on which said dwelling-house stood, dated May 2d 1820, and a deed from Peter R. Dalton, dated July 31st 1836, of the northerly part of the same premises.

Objection being taken by the defendant, that the sale by George Sullivan was void, because the license therefor was granted too late, and the judge inclining to that opinion, the plaintiff introduced evidence that Christopher Tilden left two sons and one daughter; that one of them, Christopher, died in 1818, unmarried, childless and intestate, in the life time of his mother; that said James Dalton married the daughter, Elizabeth, and had issue by her; that he was dead, and that the other son, William B., is still alive. The plaintiff also read in evidence a deed from said William B. Tilden to said James Dalton, dated April 28th 1824, quitclaiming his interest in the premises; and also a deed of Elizabeth, the widow of said Christopher, to said Dalton, dated October 1st 1819, of her interest in the premises.

The plaintiff also gave evidence of the obstruction complained of in his writ, said obstruction being the south wall of the house erected in 1841, by the defendant, on his estate, which wall was distant four inches from the window and upper wall of the plaintiff's house, and close upon his foundation wall; and that prior to the defendant's erecting said wall, he was forbidden to do so, on account of said window.

The plaintiff also read in evidence the last will of said Thomas Davis, proved on the 25th of January 1805, (by which he devised all his real estate, without any description thereof,) and a warranty deed, dated May 14th 1805, made by the devisees of said Davis to James Ivers, under whom the defendant claimed title, conveying the estate of said Davis; in which deed the title of said Davis is recited to have been derived from three conveyances, namely, from John Osborne, H. & A. Stimpson, and Nathaniel T. Tilden, administrator; "with all the privileges and appurtenances thereto belonging, and subject to the reservations, mentioned and expressed in the said deed from the administrator of Christopher Tilden deceased.

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of the right of eaves-drops where the estate late of said Tilden bounds on the land sold by said administrator to said Davis, and the right of forever keeping open the staircase window at the back of the house bounding on said land."

The defendant introduced the deposition of Esther Wheelwright, (which was objected to by the plaintiff,) for the purpose of proving that Elizabeth Tilden, widow of said Christopher, while she occupied the plaintiff's premises, after the purchase of said strip of land of the administrator of said Christopher, licensed said Thomas Davis, by parol, to stop said window, and that he accordingly did so. The defendant also introduced one Whipple as a witness, who testified that, in 1831, he owned the defendant's estate; that there was then a shed on said estate, adjoining the north side of the plaintiff's house, which did not extend up to said window; that he added one story, which covered said window, and so remained three years, until he (Whipple) sold and left the estate; that when he built up this story, he called on Peter R. Dalton, who then owned the plaintiff's estate, and gave him notice that, according to a survey of the premises made by T. P. Fuller, the wall of said Dalton's house was three inches on said Whipple's line, and that, in the rear, Dalton was two feet on said Whipple's land; that he told Dalton that he intended to erect three brick buildings on Atkinson Street; that he said nothing to Dalton about said window; and that Dalton did not, at that time, live in his house, but that it was in the occupation of his tenants. The defendant also introduced one Page as a witness, who testified that, in February or March 1841, there was a shed against the defendant's house, which covered the lower part of said window, but not the upper part thereof.

The plaintiff then introduced evidence tending to contradict the facts thus attempted to be proved by the defendant.

The defendant's counsel contended that, upon these facts, if established, a direct license had been shown, or proof upon which the jury might infer a license, by the owners of the plaintiff's estate, to the owners of the defendant's estate.

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to shut out and obstruct the light from entering said window, and that such license was not revocable by the plaintiff; that in fact the easement in question, if it ever existed, had been lost by non user and cessation of enjoyment; and that, if not extinguished by said license or non user, the extent of said right was to such light and air as was received out of Christopher Tilden's estate to the distance of twenty five inches, and no more, from the window.

It was ruled, for the purpose of reserving the questions for the court, that as to the license alleged to have been proved, by Esther Wheelwright's deposition, to have been given to Thomas Davis, it could not, if proved, avail the defendant, inasmuch as, by law, some conveyance in writing, by deed duly executed, is necessary to release or extinguish the easement so reserved as aforesaid; and further, that if it were otherwise, yet as the defendant claimed title through and under the conveyance aforesaid of the devisees of said Davis, in which said easement is expressly recited as existing, the defendant could not by law avail himself of that as an extinguishment; that the erection made by Whipple, under the circumstances hereinbefore recited, and continued as aforesaid, were not competent or sufficient in law to extinguish said easements; and that, as the defendant claimed title under the deed from the devisees of said Davis to Ivers, the right of the plaintiff to light and air through said window was not necessarily to be confined to the said space of twenty five inches, to which the estate of said Tilden extended.

A verdict was found for the plaintiff. New trial to be granted, if either of said rulings was wrong; otherwise, judgment to be rendered on the verdict.

Bartlett, for the defendant.

E. D. Sohier, for the plaintiff.

Shaw, C. J. This was an action on the case, for damage alleged to have been done by the defendant, in erecting a house on his own land, in such a manner as to obstruct the light and air which the plaintiff was entitled to through his staircase window. This was not claimed as a right by

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prescription, for light and air through an ancient window, but as a right reserved in a deed from Nathaniel T. Tilden, administrator of the estate of Christopher Tilden, under which the plaintiff claims, to Thomas Davis, under whom the defendant claims.

1. The defendant offered evidence tending to show that Elizabeth Tilden, the widow of Christopher Tilden, having a right of dower in the estate, and being in the occupation, gave a license, by parol, to Thomas Davis, to erect a building in such manner as to obstruct the air and light, in whole or in part; also that some obstructions were afterwards erected, by persons in the occupation of the defendant's estate, extending to a period of ten or twelve years; and upon these facts, if established, contended that it ought to be submitted to the jury, to prove a license, by the owners of the plaintiff's estate, to the owners of the defendant's estate, to shut out and obstruct the light from entering said window; and that such license was not revocable by the plaintiff. He also contended that, in fact, the easement in question, if it ever existed, had been lost by non user and cessation of enjoyment; and that, if not so extinguished, yet the right to light and air was to such only as could be received, if the estate, derived by Davis from Tilden, and out of which the light was reserved, had been left open and unobstructed; which was the distance of about two feet from the window. All these objections to the plaintiff's claim were overruled, and the question of damages was left to the jury.

We think there is a distinction between an executed license to impede or obstruct an easement of this description, and an abandonment of the easement. It may well be maintained, on the authorities, that the owner of a dominant tenement may make such changes in the use and condition of his own estate as, in fact, to renounce the easement itself; and this may be relied on by the owner of the servient tenement as evidence of abandonment. So, if the owner of the dominant grants a license to the owner of the servient tenement, to erect a wall which necessarily obstructs the enjoyment of the ease-

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ment, and it is erected accordingly, it may amount to proof of an abandonment of the easement. It is not a release, because it is by parol. But it results from the consideration that a license, when executed, is not revocable; and if the obstruction be permanent in its nature, it does, *de facto*, terminate the enjoyment of the easement. But the license is for the specific act only; and if, when executed, it is of such a nature as, *de facto*, to destroy the easement, but is only temporary in its nature, or limited in its terms, then, as the easement is not released, when the obstruction erected in pursuance of such specific license is removed, the owner of the servient tenement cannot erect another obstruction of the same, or of a different kind, without a new license.

But as, by the rules of law, an easement is an interest in land, to be acquired and released only by deed, as between the parties respectively, when it is contended that the owner of the dominant tenement has voluntarily abandoned his right, so as, *de facto*, to withdraw the incumbrance from the servient tenement, without a release to its owner, the proof must go to this extent: *First*, that the acts relied on were voluntarily done by the owner of the dominant tenement, or by his express authority; *secondly*, that such party was the owner of the inheritance, and had authority to bind the estate by his grant or release; and *thirdly*, that the acts are of so decisive and conclusive a character as to indicate and prove his intent to abandon the easement. *Moore* v. *Rawson*, 3 Barn. & Cres. 332, and 5 Dowl. & Ryl. 234. Various illustrations might be given of such conclusive acts of abandonment; as when one takes down the building in which a window was placed, and erects on the site a permament tenement, so constructed as not to require, or even permit, a window similarly situated; or when one grants an express license to do acts on his own land, the necessary effect of which is to take away or impair the easement permanently, and the acts are done accordingly. *Liggins* v. *Inge*, 7 Bing. 682, and 5 Moore & Payne, 712.

In the present case, applying these principles to the subject, we are of opinion that the evidence did not warrant the jury

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to find an extinguishment of the easement. The license in question, and the acts done under it, could not operate as a release, because not in writing; nor as an abandonment, because Elizabeth Tilden was not the owner of the inheritance, and had, at most, a right of dower in the premises, and the occupation, as guardian of her children, or otherwise; nor could it operate as proof of release by adverse possession, because it had not continued a sufficient length of time.

2. It is contended that there was a misdirection by the judge, in stating that the reservation, in the deed from the devisees of Thomas Davis to Ivers, precluded the defendant from setting up the supposed agreement between Elizabeth Tilden and Davis, in the life time of the latter. But the court are of opinion that this direction was right. The theory of the defendant is, that, by some parol license or agreement, Elizabeth Tilden had abandoned or relinquished to Davis the easement reserved in favor of Christopher Tilden's house, so that Davis held it free of that incumbrance, and devised it by general words of description, and died. What then were the circumstances under which the devisees were about to sell their estate to Ivers? They were about to convey the estate with warranty. The deed recites the several deeds under which their devisor claimed title, one of which was the deed from Nathaniel T. Tilden, administrator of Christopher Tilden, containing the reservation in question for the benefit of the house belonging to the heirs of Christopher Tilden, which deed was on record. Now, if they knew that a parol license had been given, or an agreement made between Mrs. Tilden and their devisor, by which the easement was suffered to be extinguished or suspended, they might also know, or believe, either that she had no such authority, or that the obstruction which was authorized was temporary, or partial and conditional. They must have known, that whether it was ever made depended on parol proof, and did not, like the reservation itself, appear of record. If, for these or any other causes, they did not claim such abandonment, but admitted the continued existence of such easement, and conveyed the estate

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subject to it, the loss was theirs, and not that of the grantee. When, therefore, they conveyed the estate to Ivers, with an express reservation of such easement, for the benefit of Tilden's house, we think the defendant, who is privy in estate with Ivers, is precluded from setting up such supposed abandonment to Davis. Ivers, by accepting the deed with such reservation, admitted the existence, at that time, of such easement in the proprietors of Tilden's estate, as an incumbrance on the estate conveyed.

3. The next direction given to which the defendant objected was, that by force of the reservation in the deed to Ivers, taken in connexion with the reservation in the deed from Tilden to Davis, the heirs of Tilden acquired a right to so much air and light as would come to said window over the space then open between said window and Davis's buildings, being in part over Davis's land, and was not confined to the air and light coming over the two or three feet of land conveyed by the same deed from Tilden to Davis. This instruction, we think, was not justified by the case.

In general, a reservation, like an exception, is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of grant.

It is well established, by the facts in this case, that at the time of the conveyance from Tilden to Davis, Tilden's was a modern house, and had acquired no right of light and air, for the staircase window, over Davis's land. Davis then had a right to build a wall quite on the extremity of his southern line. Was Davis's right to build on his own land diminished by his acceptance of this deed? We think not.

A case was cited from New York, by the plaintiff's counsel, to show that a reservation may be made of something not coming out of the estate granted, but from the grantee's own estate. *Case* v. *Haight*, 3 Wend. 635. As a proper reservation or exception, we think the principle stated is correct—that it must be something out of the estate granted. But we

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have no doubt, that by apt words, even in a deed poll, a grantor may acquire some right in the estate of the grantee. It is not, however, strictly by way of reservation, but by way of condition or implied covenant, even though the term "reserving" or "reservation" is used. If a grant is made to A., reserving the performance of a duty, to wit, the payment of a sum of money to a third person, for the benefit of the grantor, an acceptance of the grant binds A. to the payment of the money. *Goodwin* v. *Gilbert*, 9 Mass. 510. So where a demise is made to A., reserving a rent in money or in service, it is not strictly a reservation out of the demised premises; but the acceptance of it raises an implied obligation to pay the money. So we think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For instance; suppose A. has close No. 2, lying between two closes, Nos. 1 & 3, of B.; and A. grants to B. the right to lay and maintain a drain from close No. 1, across his close No. 2, thence to be continued through his own close, No. 3, to its outlet; and A., in his grant to B., should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass off freely through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land; but we think it would enure by way of implied grant or covenant, and not strictly as a reservation. It results from the plain terms of the contract.

But there is nothing in the terms of the reservation, in the deed from Tilden to Davis, which imports or implies any larger claim for air and light to this window than the owner lawfully had before. It is a simple reservation or exception, from the operation of the grant, of a right already existing, and nothing more; and that too, in a deed by an administrator, executing a power over the estate of his intestate, and not acting, or professing to act, for the heirs. Besides; the right reserved is to keep open the staircase window. It is not even said for air and light; and that it was so intended, results only from reasonable implication. As the direct and ordinary pur-

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pose of a deed poll is to transfer the rights of the grantor to the grantee, a grant, covenant or promise, by the grantee to the grantor, is not to be implied, except from such plain and express terms as will show that such was the intent of the grantee, manifested by his acceptance of the deed.

On this last ground, the verdict is set aside, and a new trial granted.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1845, AT LENOX.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES
HON. SAMUEL HUBBARD, }

COMMONWEALTH *vs.* KENDALL BAIRD.

A., who had been arrested and carried before a justice of the peace, was ordered to recognize, with sureties, to appear at a future day and abide said justice's order, and was committed to jail for not recognizing: Two magistrates afterwards took A.'s recognizance, with sureties, for his appearance, &c., pursuant to said justice's order, and A. was thereupon released from imprisonment; but he did not appear before the justice according to the conditions of his recognizance. The magistrates did not return the recognizance to the justice, but returned it to the court of common pleas held next after A.'s default. *Held*, that no action could be maintained on the recognizance.

SCIRE FACIAS on the recognizance hereinafter mentioned. The case was submitted to the court of common pleas, at the last June term, on the following facts agreed:

On the 5th of April 1844, a justice of the peace in this county issued a warrant against Orris Leach, upon a complaint charging him with having uttered and passed as true, in the State of Connecticut, certain counterfeit bank bills, and also

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with having fled from said State into this county, and being a fugitive from justice. Leach was arrested on said warrant, and brought before said justice, who, after examination, was of opinion that there was reasonable cause to believe the charge in the complaint to be true, and that said Leach might be lawfully demanded of the governor of this Commonwealth by the governor of the State of Connecticut. Said Leach was thereupon ordered to recognize, with sufficient sureties, to appear before said justice, at his office in Otis, on the 22d of said April, at one o'clock, P. M., to abide his order in said case. Said Leach, not complying with this order, was committed, on a warrant issued by said justice, to the county jail in Lenox, where he remained until the 16th of said April, when he entered into a recognizance, before two justices of the peace and of the quorum, with Hiram Leach and Kendall Baird, as his sureties, who acknowledged themselves to be jointly and severally indebted to the Commonwealth in the sum of $300. The condition of this recognizance was, that said Orris Leach should personally appear before L. Filley, Esq. on the 22d day of April 1844, at his office in Otis, at one o'clock P. M., then and there to be subject to a requisition or warrant of the governor of this Commonwealth, on the application of the governor of the State of Connecticut, to answer to a complaint of Henry B. Lyman, of New Hartford in Connecticut, which complaint was made to said Filley, on the 5th of April 1844, against Orris Leach and one Cornelius F. Backus, for uttering and passing as true, in the State of Connecticut, counterfeit bank bills, with intent to defraud, &c., and on which complaint said Orris was, by said Filley, committed to the jail in Lenox, on the 8th of said April.

After entering into the recognizance, said Orris was released from imprisonment, but did not appear before said justice, at the time appointed. The justice sent up to the court of common pleas a copy of his record, at the term of the court, held next after said 22d of April 1844; and the justices, who took the recognizance, returned it to the court of common pleas, at the same term, without having returned it to said Filley,

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and it remains on the files of said court. The sureties have never been defaulted.

The court of common pleas rendered judgment for the Commonwealth, and the defendant appealed.

Bishop & G. J. Tucker, for the defendant.

Porter, (District Attorney,) for the Commonwealth.

DEWEY, J. The objection to the regularity of the proceedings in the present case, arising from the failure of the magistrates who took the recognizance to return it to the justice before whom Orris Leach, the principal in the recognizance, was bound to appear, in order that the principal and sureties might be defaulted thereon, and these proceedings be transmitted to the court of common pleas, and there be entered of record before the issuing of a *scire facias*, is, we think, well taken, and must prevail. The proper course to be pursued in such cases seems to be well settled, and distinctly marked out, in several cases found in our reports. The case of *Johnson* v. *Randall*, 7 Mass. 340, assumes the rule to be, that justices of the peace, taking recognizances for the appearance of a party before another tribunal, must return them to the court where the principal recognizor is to appear, and if defaulted there, by reason of non-appearance before such tribunal, that court, in case it has not jurisdiction to issue *scire facias* and render judgment thereon, will certify all the previous proceedings, including the taking of the recognizance and the default thereon, to such other court as has further jurisdiction thereon. The cases of *Commonwealth* v. *Gordon*, 15 Pick. 197, and *Commonwealth* v. *M'Neill*, 19 Pick. 127, are to the same effect. All these cases seem to require, as a part of the proceedings requisite to charge the recognizors, that such recognizance be returned, in the first instance, to the court or magistrate before whom the principal is bound to appear.

The Rev. Sts. *c.* 135, § 30, have made no other change in these proceedings, besides that of providing that the omission to note or record the default shall not be a bar to the maintaining of an action on such recognizance. It is still necessary that such recognizance be returned to the magistrate; and

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the party must, in fact, make default in the performance of the condition thereof.

A *scire facias* on a recognizance can only issue from the court to which these proceedings are all properly certified, where the tribunal before which the party was to appear has not jurisdiction in proceedings on *scire facias*. But there was nothing upon the record of the court of common pleas, and nothing had been certified to that court, authorizing the issuing of a *scire facias*. The recognizance was returned there, but not through the proper channel, nor accompanied by any record showing that it had been previously returned to the justice before whom the party had recognized to appear. It is conceded, in point of fact, that it had not been thus returned, but was sent, by the magistrates who took it, directly to the court of common pleas. This was irregular, and for this cause the defence to the action is well maintained.

Judgment for the defendant.

COMMONWEALTH *vs.* THOMAS D. BONNER.

Malice, in the publisher of a libel, does not imply personal ill will towards the person libelled.

Under the Rev. Sts. c. 133, § 6, which permit a defendant, who is indicted for a libel, to give in evidence the truth of the matter charged as libellous, but provide that such evidence shall not be deemed a justification, unless it be made to appear that such matter was published with good motives, and for justifiable ends, the burden is on the defendant, not only to prove the truth of the matter so charged, but also that it was published with good motives and for justifiable ends.

THE defendant was indicted for a libel published in the "New England Cataract," a newspaper printed in Pittsfield. The indictment alleged that said libel, among other things, contained the following defamatory words of and concerning Oliver Brown: "However, there were a few who, according to the old topers' dictionary, were drunk; yea, in all conscience, drunk as a drunken man; and who, and which of you, desperadoes of the town, got them so? Was it you, whose groggery was open, and the rat soup measured out, at your

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bar, to drunkards, while a daughter lay a corpse in your house, and even on the day she was laid in her cold and silent grave, a victim of God's chastening rod upon your guilty drunkard-manufacturing head? Was it you, who refused to close your drunkery on the day that your aged father was laid in the narrow house appointed for all living, and which must ere long receive your recreant carcass? We ask again, was it you? was it you?"

The defendant was found guilty by the jury, on a trial in the court of common pleas, before *Washburn*, J. who signed the following bill of exceptions: "The publication by the defendant was proved. The defendant introduced evidence to prove, and contended that he did prove, all the facts alleged in said publication. He also introduced evidence tending to prove that the said Brown had sold ale and cider, without license, in a shop in Pittsfield used for the purpose of tippling, and in which tippling was allowed. It was admitted that said Brown was not licensed as a retailer, innholder or common victualler. The defendant contended that, by the Rev. Sts *c.* 133, § 6, the facts contained in the publication set forth in the indictment being proved, it was incumbent on the governmen. to prove that said defendant's motives, in applying the same to the said Brown, were malicious. The court charged and instructed the jury, that the burden was upon the defendant to show that the matter charged to be libellous was published with good motives, and for justifiable ends; that malice is the wilful doing of an unlawful act, and does not necessarily imply personal ill will towards the person libelled. The defendant excepted to the ruling of the court, as applied to the facts proved, as he contends, in this case, and contended that having proved the truth of all the facts alleged in the libel, and the publication being in reference to an illegal traffic, a public nuisance, the jury should have been instructed that it was incumbent on the government to show that said Bonner's motives were malicious, in the popular sense of the word, as respects said Brown; and that the definition aforesaid, given by the judge, of legal malice, is incorrect, and not conforma-

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ble to said revised statutes; and that such malice only would not sustain the indictment."

Gold, for the defendant.

Porter, (District Attorney,) for the Commonwealth.

Shaw, C. J. The court are of opinion that the charge of the judge of the court of common pleas was strictly correct. If a publication be libellous, that is, be such as to bring the person libelled into hatred, contempt and ridicule amongst the people, malice is presumed from the injurious act. But by Rev. Sts. *c.* 133, § 6, "in every prosecution for writing or publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication charged as libellous; provided, that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear, on the trial, that the matter charged to be libellous was published with good motives, and for justifiable ends." Nothing can be more explicit. The judge, therefore, was right in directing the jury that, after the publication had been shown to have been made by the defendant, and to be libellous and malicious, the burden was on the defendant, not only to prove the truth of the matter charged as libellous, but likewise that it was published with good motives, and for justifiable ends.

We are also satisfied that the judge was right in his description or definition of legal malice; that it is not malice in its popular sense, viz. that of hatred and ill will to the party libelled, but an act done wilfully, unlawfully, and in violation of the just rights of another. *Ante*, 104, 105. 1 Stark on Slander, (Wendell's ed.) 191.

Exceptions overruled.

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Levi Childs *vs.* Theodore Barrows.

An amendment may be made, by leave of court, of an officer's return of an attachment of land, by affixing his signature to the return, although another officer has duly returned a subsequent attachment of the same land in another suit.

The requisitions of the Rev. Sts. *c.* 73, § 23, that an officer, in the return of his doings in the levy of an execution on land, shall set forth the time when the premises were taken on execution, and that the appraisers appraised and set them off, are sufficiently complied with, if the officer states that, on a day named, he caused three discreet and disinterested freeholders of the county to be sworn faithfully and impartially to appraise certain real estate, that they having appraised it on oath, at a certain sum, he delivered possession and seizin thereof to the judgment creditor's attorney, and left said attorney in quiet possession thereof.

Writ of entry, brought against Theodore Barrows and Henry Hinsdale, to recover two undivided sixths of a parcel of land in Hinsdale. The parties submitted the case to the decision of the court on the following facts agreed:

"The demanded premises were a part of the real estate of Selden Spencer, deceased. The tenant Hinsdale, in right of his wife, Harriet Hinsdale, became entitled, on the decease of said Selden, to the possession of one undivided sixth part of his real estate, in common with the said Selden's other heirs. George Spencer and John W. Spencer were each entitled to an undivided sixth part of said real estate, in common with the other heirs. The demandant recovered judgment at the February term 1844, of the court of common pleas, against said George Spencer and John W. Spencer, for the sum of $1566 damage, and $14·65 costs, upon which judgment he sued out a writ of execution, on the 11th of March 1844, and caused the same to be levied upon the two undivided sixths of the real estate aforesaid, which are demanded in this suit. The same was attached upon the demandant's original writ against said George and John W. on the 18th of May 1842. The land levied upon, as aforesaid, is the same which said George and John W. owned, as heirs of said Selden, and which they held in common with said Henry Hinsdale, and Harriet, his wife, and the other heirs of said Selden.

"The tenant Hinsdale claims no title to any part of said

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land, except to one undivided sixth, in right of his wife, as before stated. At the commencement of this action, he was in possession of the whole premises, undivided, with the consent of the other cotenants; but he neither admits nor denies, and has never admitted nor denied, the demandant's right to the demanded premises, as a cotenant. If he is properly joined in this action, he is to be defaulted; otherwise, the demandant discontinues as to him.

"The tenant Barrows disclaims all title to one undivided sixth part of the demanded premises, and has never been in possession, except so far as he was made tenant in common by force of the levy of an execution, as hereinafter mentioned. He claims title to one undivided sixth of the premises described in the demandant's writ, by virtue of a levy of an execution thereon, issued on a judgment recovered by him, as administrator of the estate of Lucy Spencer, against George Spencer aforesaid, the same having been attached, upon his original writ against said George, on the 28th of June 1842.

"The officer who made the attachment on the demandant's original writ, above mentioned, against George and John W. Spencer, neglected to sign his return; but subsequently, and after the attachment was made upon said Barrows's writ against said George and John W., the court of common pleas permitted said officer to come in and amend his return, by affixing his signature thereto.

"The levy of the demandant's execution aforesaid, so far as is necessary to show the objection taken thereto by the said Barrows, is set forth in the margin.*

* "Berkshire ss. March 28th 1844. Having, at the request of the within named Levi Childs, caused three discreet and disinterested persons, freeholders in said county," (naming them, and stating which of them was chosen by each party, and which by the officer,) "to be sworn faithfully and impartially to appraise the estate above described in their certificate of appraisal, which I adopt as a part of my return; and they, the said appraisers, having upon oath appraised the whole of said estate at the sum of twelve hundred dollars, and two undivided sixth parts, belonging to said debtors as tenants in common in fee simple, at the sum of four hundred dollars; I have this day, agreeably to law, delivered possession and seizin of the said two sixth parts of said

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"If said amendment was properly allowed, and if the demandant's levy aforesaid is valid, said Barrows is to be defaulted; otherwise, the demandant is to become nonsuit."

After this statement of facts was filed, the demandant, by leave of the court, discontinued as to the tenant Hinsdale, and amended his count, so as to demand two sixths of the tenant Barrows.

Rockwell & Colt, for the tenant. The amendment of the officer's return of the demandant's writ was made too late, being after the tenant's attachment. *Emerson* v. *Upton*, 9 Pick. 167. And the demandant's levy was insufficient, as the return did not show, as is required by Rev. Sts. *c.* 73, § 23, that the land was taken, and appraised and set off, nor when these things were done.

Bishop, for the demandant. The amendment was rightly allowed. *Buck* v. *Hardy*, 6 Greenl. 162. *Johnson* v. *Day*, 17 Pick. 106. As the return of the levy showed that the officer and the appraisers had done acts, on the 28th of March 1844, which were a legal taking and appraisement and setting off of the premises, it was not necessary that he should allege, *totidem verbis*, that he had taken, and that they had appraised and set them off.

Shaw, C. J. The tenant Barrows disclaims as to one sixth, but insists on his better title to one sixth, in virtue of a levy of execution on the same, as the property of George Spencer. The demandant claims the two sixths, in virtue of his levy on the same, as the property of John W. Spencer and George Spencer, on a joint judgment against the two. The tenant's levy was prior to the demandant's, but the demandant's was made in pursuance of an attachment, on mesne process, which preceded that of the tenant. If that attachment was valid, and the levy regular, the demandant has the elder and better

premises to H. Hubbard, the said creditor's attorney, to have and to hold the same to him the said Levi Childs, the creditor, his heirs and assigns forever, in part satisfaction and discharge of the within execution and charges of levying the same," &c., "and have left the said attorney in quiet possession thereof. I do therefore return this execution satisfied in part, to wit," &c.

"G. W Branch, Dep. Shff."

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title to the one sixth in controversy, taken by each as the property of George Spencer.

The first objection is, that the attachment was not valid, because the officer who made it did not sign his return until after the tenant's attachment. But it does appear that whilst the action was pending in the court of common pleas, the officer was allowed to come in and amend his return by signing it. We think it was perfectly competent for that court to permit such amendment; and, when made, it proves that the attachment was made at the time stated in the return. The return, when amended, is to have the same effect as if it had been so made originally. Any other construction would lead to uncertainty, and make the rights of parties depend upon unsatisfactory parol proof.

We have considered it, as if the fact of such amendment being made after the tenant's attachment were judicially proved, because the case comes before us by an agreed statement embracing that fact. But if the question had arisen, in the course of the trial, on a question of title, and, to prove the fact and time of attachment, a certified copy of the writ and return from the record of the court of common pleas, all appearing complete and correct, had been given in evidence, it is doubtful, to say the least, whether evidence would have been admissible to show that the return had been signed after the cause came into the court of common pleas, in pursuance of an order of that court.

An objection was taken to the demandant's levy, viz. that it does not distinctly appear by the return that the land was taken, appraised and set off, and the time when it was set off. Rev. Sts. *c.* 73, § 23. We think this objection is not sustained by the proof. The return of the officer certifies acts done, which constitute a taking or seizing. He caused it to be appraised, and delivered possession and seizin to the creditor's attorney, and left him in quiet possession; which could only be done on the premises. The date of the oath, the appraiser's certificate and the return, being all of the same day, prove the time of the taking.

Judgment for the demandant for the one sixth not disclaimed

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Pliny Moore *vs.* Edward Moore.

A promissory note may be given in evidence on the money counts, as well when the action is defended by subsequent attaching creditors as when it is defended by the original defendant.

Assumpsit on the money counts. Property of the defendant was attached on the original writ, and he was defaulted in the court of common pleas, at the return term. Wilson, Butler & Co., creditors of the defendant, who had attached the same property after it was attached by the plaintiff, were admitted to defend, pursuant to the Rev. Sts. *c.* 90, § 83.

The plaintiff offered in evidence two promissory notes, payable to himself or bearer, on demand, signed by the defendant, copies of which had been filed in the case, as a bill of particulars, before the trial, but not until after said Wilson, Butler & Co. had been admitted to defend. These defending creditors objected to the admission of the notes in evidence under the money counts, "on the ground that, as against subsequent attaching creditors, it was introducing into the declaration a new cause of action." The court of common pleas overruled the objection, and admitted the notes in evidence. A verdict was returned for the plaintiff, and the defendant alleged exceptions.

Porter, for the subsequent attaching creditors, cited *Peirce* v. *Partridge*, 3 Met. 49; *Fairfield* v. *Baldwin*, 12 Pick. 388; *Hodges* v. *Holland*, 16 Pick. 395; *Adams Bank* v. *Anthony*, 18 Pick. 238; and *Willis* v. *Crooker*, 1 Pick. 204.

Byington, for the plaintiff.

Shaw, C. J. The rule, that a promissory note may be given in evidence under a count for money had and received, proves that such declaration embraces such cause of action, and that the offer of the notes is not the introduction of a new cause of action. The pleading, and the proof, and the course of trial, are the same, whether a cause is defended by he original defendant or by a subsequent attaching creditor.

Exceptions overruled.

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William Hall & wife *vs.* Jonathan C. Stevens.

A tenant in a writ of entry may give in evidence, for the purpose of disproving the demandant's seizin, a deed of the demanded premises, given to a third person by the ancestor under whom the demandant claims title.

When a party's first entry upon land, and his occupation thereof, were by permission of the owner, the legal presumption is, that his subsequent occupation was also permissive, and not adverse, unless some act of his is proved which constitutes a disseizin of the owner.

Writ of entry to recover one undivided fifth part of two parcels of land in Sheffield. At the trial before the chief justice, the title relied on by the demandants was, that Stephen Stevens, in his life time, was seized of a large tract of land in Sheffield, of which the demanded premises were parcel; that he died intestate, leaving the female demandant, the tenant, Hiram C. Stevens, William J. Stevens and Mary Sumner, his only heirs at law. These facts were not denied by the tenant; but he relied on two grounds of defence: *First*, that Stephen Stevens, in his life time, conveyed the demanded premises, so that nothing passed by descent to his heirs; *second*, that said Stephen made a parol gift of the demanded premises to the tenant, who entered under the same, as owner, and had the exclusive and adverse possession more than twenty years before any conveyance made by said Stephen; and thus that said Stephen's right of entry was barred, and that the tenant had a good title.

In support of the first ground of defence, the tenant offered in evidence a deed from said Stephen to his daughter, Mary Sumner, dated March 8th 1841, by which he conveyed, with warranty, all his lands in Sheffield, including the demanded premises, if they were lands then owned by him. This deed was offered, to disprove the seizin of the demandants, and it was objected to, on the ground that the tenant did not claim under it. But the judge ruled that the deed was admissible, to show that Stephen Stevens conveyed away all his estate in the demanded premises, by a valid and sufficient deed, and that nothing therein descended from him to his heirs. The

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execution, delivery, acknowledgment and registration of said deed were then proved; and it further appeared that Mary Sumner, the grantee, had heretofore commenced a suit, for these same demanded premises, against the present tenant, which was evidence of her acceptance of the deed.

The demandants further objected, that it was incumbent on the tenant to prove, not only that a conveyance was made to Mary Sumner in 1841, but that it was a subsisting and outstanding title at the time of the death of Stephen Stevens, and at the time of the commencement of this suit. But the judge ruled, that if a good and valid conveyance was made to Mary Sumner in 1841, and accepted by her, by which she became seized in fee, the presumption in law was, that she continued so seized to the time of the commencement of this action, if nothing was shown to the contrary. No evidence to the contrary was offered.

The demandants, to avoid the effect of said deed to Mary Sumner, offered in evidence a judgment of this court, at September term 1843, in a suit by Mary Sumner against the present tenant, to recover the two parcels of land demanded in this action; which judgment was in favor of the tenant. (See 6 Met. 337.) This judgment was relied on as showing that nothing passed by the aforesaid deed to Mary Sumner. The demandants, also, with a view to prove that the said judgment did not necessarily show a good title in the tenant, by parol and the statute of limitations, and that it might have passed on other grounds, offered parol evidence to show that the ground stated in the report of the case, in 6 Met. 337, was not the only ground of defence, but that there were two other grounds, which, as they were not the ultimate grounds of decision, do not appear in the report, nor on the record. Whereupon, Hiram C. Stevens testified, that he was present at the trial of the case of *Sumner* v. *Stevens*, before Judge Wilde; that the first ground of defence was, that Jonathan C. Stevens had a deed of the premises from his father, which was lost; but that the judge decided that, as he had not made oath to the loss of the deed, secondary evidence of it could

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not be admitted: That the second ground of defence was a parol gift by his father, an entry under it, and an adverse and exclusive possession more than twenty years: That the third ground of defence was, that Jonathan C. Stevens was in possession when the deed was made to Mary Sumner, and therefore nothing passed by it; and that it was decided that if said Jonathan C., or any other person, was in adverse possession, claiming title, when said deed was made, no estate passed by it.

The parties went into evidence, to show the nature and length of Jonathan C.'s occupation — the demandants, to prove that it was permissive only, as tenant at will; and the tenant, to show that it was under a parol gift, in pursuance of which he had entered as owner, and had adverse and exclusive possession more than twenty years. The evidence tended to show that the occupation of said Jonathan C., whether adverse or permissive, had continued more than twenty years, having commenced in the year 1816.

The judge, not deeming it necessary to decide whether said occupation was adverse or permissive, proposed to instruct the jury as follows: If Stephen Stevens, twenty years or more before the 8th of March 1841, did, by parol, give the demanded premises to his son, the present tenant, to have as his own, and he entered as owner, and held adverse and exclusive possession, then he had a good title, as against his father; and if the estate in question did not pass by his deed to Mary Sumner, it was because he did not own it, and therefore it did not descend to his heirs, and the female demandant took no title as heir. But if Stephen Stevens had not given the lots to his said son, but permitted him to have the use and occupation of them, then he was a tenant at will, and not a disseizor; his possession, as such tenant at will, did not prevent the grantor from conveying his estate; the estate did pass, by his deed to Mary Sumner, and no interest or right remained to descend to his heirs; and, in either case, the demandants were not entitled.

It was suggested by the demandants, to avoid this dilemma,

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that if the original entry and occupation of said Jonathan C. were permissive, and he held as tenant at will, yet if, within twenty years, he had disseized his father, no estate would pass by the father's deed to Mary Sumner, but a right of entry would remain in him, which might descend to his heirs, and would be sufficient to maintain this action. The judge, being of this opinion, proposed to rule accordingly. But as this was a question of fact, the judge proposed to instruct the jury, that the presumption was, that if the entry and occupation were originally permissive, they continued to be permissive, unless the contrary was shown by proof of some act to change that relation and constitute a disseizin; and therefore that it was incumbent on the demandants to prove such change of relations and disseizin.

The demandants declined going to the jury upon this question, and consented that a verdict should be entered for the tenant, subject to the opinion of the whole court upon the foregoing decisions.

Bishop, for the demandants.

Porter, for the tenant.

WILDE, J. At the trial of this case, several exceptions were taken to the rulings of the court, none of which appear to be well founded. The demandants claim title under Stephen Stevens, deceased, the female demandant being one of his heirs at law.

The first ground of defence was, that said Stephen had conveyed the demanded premises to his daughter, Mary Sumner, and consequently, that no title descended to his heirs. It was objected that a party cannot be allowed to show a title in a third person, unless he claims under it; and this general principle is admitted. But it is not applicable to a case where a demandant fails to prove his seizin, or the seizin of his ancestor. Any evidence, therefore, which disproves the seizin of the demandant, is admissible on the part of the tenant. Jackson on Real Actions, 5. *King* v. *Barns*, 13 Pick. 24. On this ground, the deed of Stephen Stevens to Mary Sumner was admitted in evidence; and for this purpose it was un-

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doubtedly admissible, and was conclusive proof that his title did not descend to his heirs, unless, after the conveyance, he had acquired a new title — which the demandants did not attempt to show. But they attempted to show that, at the time when the deed to Mary Sumner was given, the said Stephen was disseized by the tenant, and so nothing passed by that deed. It was thereupon ruled, that if the tenant had so disseized the said Stephen, and had continued his adverse possession for twenty years or more, that would give to the tenant a good title, or would bar the demandants' title, by the statute of limitations; and this ruling was undoubtedly correct. So that whether said Stephen, when he conveyed the premises to Mary Sumner, was seized or disseized, the demandants' title fails. If he was seized, the estate passed to Mary Sumner; and if not, the tenant's adverse possession would be a good bar.

It was argued by the counsel for the demandants, that the deed to Mary Sumner was given within the time of limitation, and that, although said Stephen was then disseized, it did not follow that the disseizin had commenced and continued for twenty years before the commencement of the present action. But this was a question for the jury, which the demandants declined to submit to them. The only ruling touching this point was, that if the entry of the tenant was proved to have been permissive, it was incumbent on the demandants to prove that afterwards the tenant did some act which would constitute a disseizin; the presumption being, that if his first entry was permissive, his possession so continued, unless the contrary was made to appear. The correctness of this ruling cannot be doubted.

In every respect, therefore, we are of opinion that the rulings at the trial were correct, and that the tenant is entitled to.

Judgment on the verdict.

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Inhabitants of New Marlborough *vs.* County Commissioners of Berkshire.

Under the Rev. Sts. *c.* 24, the question whether an adjudication as to a highway or a town way, made by county commissioners at the time of their view or at a special meeting, is to be regarded as final, or as subject to confirmation or reversal at a subsequent regular meeting, is to be determined by their intention, as manifested by their records.

On a petition to county commissioners to alter a town way according to a report of selectmen, which the town was alleged to have unreasonably refused to accept, the commissioners gave notice to the town, had a view, and afterwards, at a special meeting, ordered that the petition be dismissed: This order was not recorded, nor filed with the clerk for record: At the next regular meeting of the commissioners, they ordered that "said report be not accepted," allowed the petition to be amended, and proceeded anew. *Held*, that the order at the special meeting was not final; that it was lawfully vacated at the regular meeting; and that the commissioners were thereupon authorized to proceed anew.

A petition to county commissioners to alter a town way according to a report of selectmen, which the town is alleged to have unreasonably refused to accept, may be amended, even after a hearing of the parties on the petition, by striking out the alleged unreasonable neglect of the town, and substituting an allegation of the unreasonable neglect of the selectmen to alter the way.

An amended petition to county commissioners may well be signed by the petitioners' attorney, although they signed their own names to the original petition.

The omission of county commissioners to take a new recognizance for costs, upon an amended petition for an alteration of a town way, is no ground for a writ of *certiorari* to remove the record of their proceedings in altering the way conformably to such petition.

A petition to county commissioners to alter a town way alleged that the town had unreasonably refused to accept the report of the alteration thereof by the selectmen; and notice of the petition was served upon the town: The petition was afterwards amended, by striking out this allegation and alleging that the selectmen unreasonably refused to alter the way. *Held*, that a new notice to the town, by service of a copy of the amended petition only, was sufficient.

A defective notice, given to a town, of a petition to county commissioners to alter a town way, is no ground for a writ of *certiorari*, on the application of the town to remove the records of the commissioners' proceedings, if the town acted on such notice and appeared before the commissioners.

The omission of selectmen to make a written report to the town of their alteration of a town way, on a written petition for an alteration, is such a refusal or neglect to alter it as gives jurisdiction of the matter to the county commissioners, under the Rev. Sts. *c.* 24, § 71.

The costs of proceedings before county commissioners, in the alteration of a town way, are matter of discretion with the commissioners; and a writ of *certiorari* will not be granted for the purpose of revising their adjudication as to such costs.

Petition for a writ of *certiorari*. It was alleged in the petition, that Samuel Pettibone and others, on the 23d of January 1844, made a written representation to the county com-

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missioners, that public convenience and necessity required an alteration in a certain town way in New Marlborough; that said Pettibone and others, in September 1843, petitioned the selectmen of New Marlborough to lay out said alteration, and report their doings to the town; that said selectmen reported an alteration in said town way, and that the town, at a meeting held on the 13th of November 1843, unreasonably neglected to accept said report; wherefore said Pettibone and others petitioned the county commissioners to view said alteration, and cause the same to be established as a town way: That said commissioners thereupon determined to view the premises, and hear all parties interested, and appointed the 14th day of March 1844, as the time, and the house of Seth Norton, in New Marlborough, as the place, for such hearing: That said commissioners gave notice to all parties interested, and met at the time and place aforesaid, and adjourned to the 9th day of April 1844, when they proceeded to view, and heard the parties, and further adjourned, for consideration, to the 8th day of May 1844, when they met at Pittsfield, and considered the whole matter, and adjudged and determined that the town of New Marlborough did not unreasonably refuse or delay to approve and allow the said town way, and thereupon ordered said petition to be dismissed, with costs: That afterwards, at a meeting of said commissioners, held at Lenox, on the first Tuesday of July 1844, the said petitioners (Pettibone & others) presented a petition to said commissioners, by I. Sumner, their attorney, praying leave to amend their former petition; and that the commissioners then and there received and allowed an amendment, in which it was alleged that the selectmen of New Marlborough unreasonably refused and neglected to alter the town way mentioned in said first petition, although thereto requested in writing by said petitioners and other inhabitants of said town, within one year from said first Tuesday of July; and praying the commissioners to cause said town way to be altered, to ascertain the place and course of the way, and to estimate damages: That the commissioners, upon said amended petition, determined to

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view the premises and to hear all parties interested, and appointed the 29th day of August 1844, as the time, and the house of Seth Norton, in New Marlborough, as the place of meeting for such view and hearing, and ordered thirty days' notice of said time and place of hearing to be duly given: That the commissioners met, pursuant to said appointment, and after hearing objections, from said town, against their proceeding, they viewed the premises and heard the parties, and adjudged and determined that the selectmen of New Marlborough had unreasonably neglected and refused to lay out and alter the town way within the termini set forth in the petition, and that common convenience and necessity required that the same be laid out and established as a town way: That the commissioners, on the 8th of October 1844, laid out and established the said town way, as prayed for, and ordered said town to make said road, at its own expense, by the 1st of May 1846; and also ordered and adjudged that said town should pay all damages to the owners of the land over which said way should pass, amounting to $243·37, and also all the costs of prosecuting, as well on the original as on the amended petition, amounting to $134·20. Wherefore the present petitioners prayed that the record of the said proceedings of the commissioners might be brought before the court and be quashed.

A certified copy of the record and minutes of the proceedings of the commissioners, which accompanied the petition, showed that the allegations in the petition were truly made; and that, at the commissioners' meeting in July 1844, it was ordered that the report made at Pittsfield "be not accepted," and that said Pettibone and others "have leave to amend their petition, as on file." It also showed that the second notice to the town was served by publishing, &c. an attested copy of *the amended petition only;* that the town appeared, pursuant to said notice, by their agent and attorney, who objected to any further proceedings being had by the commissioners, on the ground that the town had no legal notice of the original petition, but only of the amendment thereof, and that no

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recognizance for the payment of costs was taken on the amended petition; and that these objections were overruled by the commissioners: That the petition of Pettibone and others to the selectmen was thus: "Feeling that the public convenience requires an alteration in the road leading from Newton Kasson's to Calvin Ward's, commencing near the foot of the hill east of James T. Rhoades's, and running near the river, until it intersects the old road; we ask you to view and survey the said premises, and call a town meeting, as soon as may be, and lay it before them:" That the selectmen made and signed what they termed a "survey of a highway near James T. Rhoades's, beginning at a stake and stones standing south 78½ degrees west of the chimney of Newton Kasson's dwelling-house, and south 51 degrees west of the chimney of Mr. Utley's dwelling-house; thence south 40½ degrees west, seven rods and three links, to a stake and stones; thence" (by numerous courses and distances) "to the travelled road near Calvin Ward's dwelling-house:" That said survey was filed with the town clerk, seven days before the town meeting which was called to act thereon: That the selectmen, in the morning of the day of said meeting, assessed damages to each owner of the land included in said survey, and reported them verbally at said meeting, without signing any paper concerning said assessment; and that no written report of the laying out or alteration of said way was made by the selectmen.

Byington, for the petitioners. 1. The original petition was ended when the respondents dismissed it, and it could not be revived by an amendment. It will be argued, that as the order of dismissal was made *in pais*, and was not ratified *in banco*, the respondents had a right to proceed as if nothing had been done *in pais*. But the answer is, that by the Rev. Sts. *c.* 24, § 4, an authoritative and final judgment or order may be rendered, in the country, by the commissioners, "either at the time of the view, or at any regular or special meeting, or any adjournment thereof." The meeting at Pittsfield was a special meeting, or an adjournment of a special meeting,

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and the order of dismissal was then rightfully passed, and should have been entered of record at the next regular meeting at Lenox. See *Hull* v. *Inhabitants of Berkshire*, 9 Pick. 553.

2. If the order of dismissal at Pittsfield was not *finis litis*, yet the respondents had no authority to allow, by way of amendment, an entirely new and different petition. A new petition should have been filed, which should have been *signed by the petitioners*; and proceedings *de novo* should have been ordered.

3. A new recognizance should have been taken for costs on the amended petition, as those costs were not covered by the recognizance taken on the original petition. Rev. Sts. *c.* 24, § 41.

4. Notice of the whole petition, original as well as amended, should have been served on the town, in order to give jurisdiction to the commissioners. Rev. Sts. *c.* 24, § 2. *Inhabitants of Rutland* v. *County Commissioners*, 20 Pick. 71. This objection was made at the first opportunity, and was improperly overruled by the respondents. *Commonwealth* v. *Westborough*, 3 Mass. 406. *Inhabitants of Danvers* v. *County Commissioners*, 2 Met. 185.

5. The selectmen did not unreasonably refuse to lay out the way. They executed their power defectively; but this did not give the respondents authority to proceed upon the ground of a refusal by the selectmen.

6. The costs of the proceedings on the original petition were unwarrantably imposed on the town.

Sumner, for the respondents. 1. There has been *no adjudication* that the original petition should be dismissed. The respondents, as a viewing committee, held that the petition was not supported, and should therefore be dismissed. As a court, they afterwards refused to dismiss the petition, allowed an amendment thereof, and ordered notice of the amended petition. After notice, and a full hearing on the part of the town, the respondents proceeded to make the alteration in the way, which was prayed for. Whether they might have adhered to the views which they had at Pittsfield, and have

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caused an entry, conformable thereto, to have been made at their next regular meeting at Lenox, need not now be decided. Probably they might. But the Rev. Sts. *c.* 24, § 4, do not require that they should do so.

2. The respondents' power to grant the amendment is incident to their office, if not expressly conferred by Rev. Sts. *c.* 100, § 22. And the petitioners could as well act by attorney, in requesting an amendment, as in any other matter.

3. The taking of a recognizance was no concern of the town.

4. Notice of all that was to be acted upon was given to the town, upon the amended petition, and the town appeared and had a hearing, having previous knowledge of all that had been done on the original petition.

5. The respondents have decided, as a fact, that the selectmen unreasonably refused to lay out the alteration in the way; and that decision is warranted by the record and testimony in the case. *Todd* v. *Inhabitants of Rome*, 2 Greenl. 55.

6. This court cannot revise the order of the respondents as to costs, which are matter of equitable discretion, on a view of all the facts. Those facts are not shown by the record alone.

Dewey, J. Numerous objections have been taken to the proceedings of the county commissioners in the case sought now to be revised on *certiorari*.

1. The great and leading objection, and the only one which presents any difficulty, or occasion for serious doubt, is that arising upon the course of proceedings required under the Rev. Sts. *c.* 24, § 4. That section applies particularly to highways, but §§ 71, 75, make it alike applicable to cases of proceedings by county commissioners, on application for the location of town ways, where the selectmen unreasonably neglect to lay them out, or the town unreasonably refuses to approve and allow them. Sect. 4 provides, that "the commissioners shall hear the parties, either at the time of the view, or at any regular or special meeting, or any adjournment thereof, as they shall determine; and as soon as may be after

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the hearing, they shall proceed to adjudicate," &c. The inquiry then arises as to the effect of such adjudication made at the time of the view, or at some special meeting other than the regular term. Is it to be treated as a final adjudication, and a termination of all action by the commissioners, so that nothing more remains to be done, and that, to all intents and purposes, such adjudication has the like effect as an adjudication at a term regularly holden and attended by a clerk to record all orders; or is the matter acted upon to certain purposes only, and subject to the control and revision of the commissioners at any time before the same is filed for record at the regular term? Looking at the statute, it is quite apparent that, to some extent, it favors the position, that an adjudication at the time of a view is a judgment, a determination which is made the basis of future action and further proceedings, and of proceedings which are to be commenced before the next regular term. Thus, in § 6, it is provided, that upon an adjudication, made at the view, of the common convenience and necessity of laying out, or of altering or discontinuing a highway, if no person interested shall object, the commissioners may forthwith proceed to lay out, alter, or discontinue such highway. These latter acts all imply a final determination, already had, of the question of expediency, or common convenience and necessity. On the other hand, these special meetings in vacation, held at other places than the shire town, and unattended by any clerk or other officer required to record orders and judgments, are certainly of an anomalous character, if the full effect is to be given to decrees made at them, which is given to those made at term, announced to the clerk as such, and by him recorded or noted for record.

The difficulty and embarrassment in the case have arisen from the attempt to unite, in the same board, all the duties formerly performed by the court of sessions at term, and the further duties formerly assigned to special committees, appointed by that court, to make the view and report their opinion of the common convenience and necessity of granting the prayer of the petitioner. While this practice continued,

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it was very simple and easy of application. The committee acted in the vacation, but having no final powers, their duty was to report, and the final adjudication was to be made by the court of sessions, at the regular term.

The result of the change has been, as we understand, a considerable diversity in practice, as to the manner in which these adjudications have been considered by the commissioners themselves. In some counties they have, in form, assumed to be nothing more than reports; and the course has been, formally to accept them at the next regular term, before they were filed for record. In others, while less formality of presenting the adjudication for a formal acceptance has prevailed, yet the papers and accompanying adjudication are officially returned and entered as the doings of the commissioners, and ordered to be recorded. Admitting this latter mode to be well authorized by the statute, and supposing it to be competent for the commissioners to treat an adjudication, made at the view, as a final adjudication and determination, and that nothing more is required to be done, but to file the same at the next term, and order it to be recorded; the question then is, whether this is the only course of proceeding that can be sanctioned by law. Now it seems to us, that what is to be taken as the final determination and adjudication of the commissioners must depend upon their own course of proceeding, disclosed by the record of their doings. Their decrees and adjudications are to be learned from the record, which is the only legal manifestation of them. Whenever, therefore, the commissioners themselves set forth the proceeding on the view as a mere preliminary adjudication, to be subsequently confirmed and accepted at a regular meeting, and proceed, at such regular meeting, to deal with it as such, and dispose of it as an open question; and all this before any record has been made, or papers filed for record with the clerk, of an adjudication at the time of view; we must understand that the commissioners, in expressing their opinion at the time of the view, do so *de bene esse*, and that it is not to be regarded as final, until so ordered at the regular term. It is competent for them

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so to do; and the only question will then be as to the nature of their adjudication, as indicated by the record finally made up.

In examining this record, although, looking exclusively at the proceedings at the time of the view in May 1844, we might well suppose them to be of the nature of a final determination of the question before them, and that nothing remained but to file the same for record, yet the entire record indicates a different state of things. The record states that, "at the commissioners' meeting, July 1844, after hearing the parties on this report, it is ordered that the same be not accepted." Before placing upon the record their doings at the special meeting at Pittsfield in May, they reconsider the same and reject it. The manner in which the commissioners, in fact, treated their adjudication of May, is quite obvious; and under the view we have taken of the provisions of the statute, it was competent for them to postpone their final action, and to revise their adjudication at any time before the close of the next regular term, if they had not already filed it with the clerk of the court for record, as their final adjudication upon the subject matter. In this way, we may sustain the proceedings in this case, without calling in question the validity of a different course of proceeding already alluded to, viz. making the adjudication at the view, or at some special meeting, and taking no further order thereon afterwards, at the regular term, except to order the same to be recorded.

The provisions of *St.* 1839, *c.* 76, are indicative of the course to be pursued, at least in one class of cases of view and adjudication at the time of the view, and in which further action at the next regular meeting is essential to the completing of the adjudication. The case is that of a discontinuance of a highway, upon the view. The statute provides that the commissioners may, at the same time, adjudge that the said way be discontinued and assess the damages, "and when a return of said proceedings and adjudication is made, at the next regular meeting of the commissioners, and accepted, it shall be held to be a discontinuance of such highway."

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In this class of cases of adjudication at the view, we have, therefore, an express legislative provision, that an adjudication, made at the time of the view, is only final and effectual upon being accepted at the next regular term. The case before us was not of the kind provided for in this statute; but the reason for such mode of proceeding applies to both classes of cases.

2. The next objection taken is to the authority of the commissioners to allow the amendment made to the original petition, which, it is contended, essentially changed the ground of the application to the commissioners. The original petition alleged that the town of New Marlborough refused to accept a town way laid out by the selectmen, and the amended petition alleged that the selectmen refused to lay out a way duly applied for by the petitioners. This amendment introduces a new cause of complaint, but not new parties. Although the allegation is, that the selectmen refused to lay out the way, still the town is the only party to be proceeded against, in either case. The town is chargeable for the delinquency of the selectmen in this matter, and liable for costs, as much in one case as the other. It was competent for the commissioners to allow such an amendment, and this objection is not sustained.

Nor is the objection, that the amended petition was not personally signed by the petitioners, one that can avail. It was signed by their attorney, acting on their behalf and representing their interests, and was in amendment of the original petition signed by them.

3. To the objection that no new recognizance was taken, various answers may be given. If the amendment was well granted and properly engrafted upon the original petition, the original recognizance would still attach to the proceedings, after the amendment. But the omission to take a recognizance would not furnish any sufficient reason for granting a *certiorari*, and especially where no benefits have been lost by the omission. Here the result of the adjudication is such that the recognizance would have been discharged if it had been given.

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4. We perceive no substantial defect in the notice to appear in August 1844, as it distinctly recited the matter upon which the commissioners were to act. Further; it was effectual as notice, inasmuch as the town of New Marlborough acted upon it, and appeared by their attorney; which would of itself be a sufficient answer to an application for a *certiorari* for this cause.

5. It is said that there was no refusal by the selectmen to lay out the way, and therefore there was no case for the action of the commissioners. But we think that the facts show sufficient ground for the commissioners to take jurisdiction under the statute. The proceedings of the selectmen are so essentially defective, and so irregular on the face of them, as to require them to be treated as a neglect and refusal to lay out the way. Without alluding to other defects, it is sufficient to say that the neglecting to report the laying out of the same, in writing, to the town, was a neglect and refusal to lay out the way prayed for.

6. The only remaining objection is that of the amount of costs assessed upon the town of New Marlborough. The entire costs were assessed upon that town. As an original question, it would seem that this was not quite reasonable; and as to the costs incurred before the petition was amended, that they ought to have been paid by the petitioners, before leave should have been given to amend their petition. But we may not be possessed of all the facts bearing upon that question. It was competent for the county commissioners to decide as to the costs, and they having exercised their judgment in the matter, we do not see cause to grant a *certiorari* for that reason.

Petition dismissed.

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John P. Beekman *vs.* George Wilson.

When a note is indorsed in blank, an action in the name of a third person may be maintained against the indorser, for the benefit of the indorsee, with his consent.

Under the fourth section of the United States bankrupt act of 1841, a discharge of a bankrupt, when it is set up as a bar to an action against him, may be impeached and avoided by proof of his having given to one or more of his creditors a preference, which the second section declares to be a fraud upon that act.

Certain creditors of a bankrupt, who had proved their claims against him, opposed his discharge, and an issue was framed and tried in the district court of the United States, involving the question whether the bankrupt had been guilty of any fraud or wilful concealment of his property, or had preferred any of his creditors, contrary to the provisions of the bankrupt act; the jury returned a verdict in his favor, and the court granted a discharge and certificate: Afterwards, a creditor, who did not prove his claim under the proceedings in bankruptcy, nor appear before said court to oppose said discharge, brought an action against the bankrupt, who set up said discharge as a bar. *Held*, that the verdict was not conclusive against the plaintiff, and that he might impeach and avoid said discharge, by evidence that the defendant had preferred one creditor to another, contrary to the provisions of the bankrupt act.

Assumpsit on the following note: "Lee, October 9th 1841. Ninety days after date, for value received, I promise to pay to the order of John Baker five hundred dollars, at the Kinderhook Bank. George Wilson." The note was indorsed in blank by said Baker and by M. D. Field. The plaintiff described himself as "president of the Kinderhook Bank." The defendant pleaded the general issue, and relied on a discharge under the United States bankrupt act of 1841.

At the trial in the court of common pleas, before *Washburn*, J. the defendant objected to the maintenance of this action in the plaintiff's name, because the note declared on was the property of the Kinderhook Bank; and the plaintiff thereupon admitted that the note was discounted by said bank for the defendant, and that it was ever afterwards, and at the commencement of this action, the property of said bank. The defendant admitted that the note was brought into this county, by the cashier of said bank, and delivered to an attorney with directions to sue it in the name of the plaintiff, as president of the bank; and that the action was commenced, and had been carried on, under this authority and direction.

The plaintiff produced a statute of New York, passed in

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1838, which provides, among other things, that "all suits, actions and proceedings, brought or prosecuted by or in behalf of such association," (free bank,) "may be brought or prosecuted in the name of the president thereof." And it was admitted that the Kinderhook Bank was organized and went into operation under this statute, and that the plaintiff was president of that bank.

The judge, being of opinion that if said statute did not authorize the commencement of the action, in this State, in the name of the president, yet that the evidence showed that he was so far the holder of the note as to authorize him to bring the action, overruled the objection.

The defendant then gave in evidence a certificate of discharge under the United States bankrupt act. Thereupon the plaintiff (having previously given the defendant notice) offered to impeach said discharge, on the ground of a wilful concealment of property, and a fraudulent preference of certain creditors. The defendant objected to the admission of this evidence, and denied its competency, because, in a hearing before the district court of the United States, upon objections there made, by certain creditors of the defendant, to the granting of said discharge, an issue, involving the same questions now offered to be tried, was framed and tried by a jury, and a verdict was thereupon found for the defendant; and the defendant produced in evidence a copy of the record of said proceedings in the district court, and also of the notice of the pendency of said proceedings, published by order of said court. But it was admitted, that neither the present plaintiff, nor any holder of the note in suit, ever proved any debt against the defendant, in bankruptcy, or had any notice of the issue and trial aforesaid, except the constructive notice arising from the publication of the same, as aforesaid, and the facts, that the plaintiff's attorney in this action was of counsel for the creditors who opposed said discharge, and that the present action was pending at the time of the said hearing before the district court. The judge overruled the objection, and admitted the evidence.

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The evidence showed that the defendant, before his bankruptcy, was a manufacturer of paper and had a grocery store in Lee; that between the 12th of March 1842 and the time when he made his application in bankruptcy, viz. August 17th 1842, he paid certain debts. The evidence also tended to show that the defendant was actually insolvent on said 12th of March; that he then stopped his accustomed business, and went into the employment of one Sturgis, who became a receiptor for the property attached in this suit, and afterwards undertook to carry on the paper mill which was before occupied by the defendant, and hired the defendant to superintend it.

The judge instructed the jury, that "if the defendant, knowing his own actual insolvency, and believing that he could not proceed in business, did, in view of that state of things, and for the purpose of giving preference to one or more creditors and preventing an equal distribution of his estate among his creditors, convey or transfer any estate to such preferred creditors, it was a fraud upon the bankrupt act and avoids his discharge; that it was not necessary that there should have been an intention then formed, or existing at the time of making such preference, to avail himself of the benefits of said act; and that he need not have been guilty of moral turpitude, in order to constitute such preference a fraud under said act."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the judge's rulings and instructions.

Bishop & Byington, for the defendant.

Porter, for the plaintiff.

The opinion of the court was delivered at September term 1846.

Dewey, J. It is no sufficient objection to maintaining this action, that the plaintiff on the record is not the party beneficially interested, and, as such, entitled to retain the avails of the judgment for his personal benefit. That privity of contract, which is required in the action of assumpsit, is sufficiently shown in the case of a negotiable note payable to the

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order of the promisee and indorsed by him in blank, when an action is instituted in the name of the holder of such note, who came into the possession of it with the assent of the party in interest, and the suit is really prosecuted for the benefit of such party, and without any objections interposed by him. In such cases, the maker of the note cannot object merely to the want of interest, or privity of action, on the part of the plaintiff. This seems to be well settled by the cases of *Little* v. *Obrien*, 9 Mass. 423; *Brigham* v. *Marean*, 7 Pick. 40; *Dean* v. *Hewit*, 5 Wend. 257; *Gage* v. *Kendall*, 15 Wend. 640; and *Guernsey* v. *Burns*, 25 Wend. 411. This rule of law, so well established, sufficiently answers the first objection taken to the action, and renders it unnecessary to consider the effect to be given in Massachusetts to the statute of New York, which gives, in direct terms, authority to the president of a banking association, like that of the Kinderhook Bank, to institute actions in his name upon demands due to the bank. Whether such statute could have any force and effect beyond the territorial limits of the State of New York would be questionable.

Assuming the action to be properly instituted in the name of the plaintiff, it is further objected, that the cause of action has been discharged by a certificate of discharge duly given under the late bankrupt law. *United States St.* 1841, *c.* 9. That such discharge was given is conceded; but the plaintiff would avoid its effect by showing fraudulent preferences, made by the defendant in behalf of certain creditors, in violation of the provisions of the bankrupt act. The defendant objects to this evidence as incompetent; 1st, because the same matter was put in issue by the creditors of the defendant, upon his application for a certificate of discharge, and upon a hearing thereupon, the decision being against the creditors, and a discharge having been granted, the matter is *res adjudicata*, and no longer open; and 2d, that the evidence, if admissible, is insufficient to invalidate the discharge, it not showing such a fraud as will, under the provisions of the bankrupt act, avoid the certificate of discharge.

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As to the first of these objections, it seems to us that the proceedings by the creditors under the provisions of the second section of that act, which authorizes them to interpose objections to the granting of the discharge and the issuing of the certificate, are in no respect a bar to setting up fraud in avoidance of the discharge under the authority given by the fourth section. Both modes of proceeding are authorized by the statute, and the creditors may avail themselves of one or the other, or of both, as they may deem expedient. The purpose of the bankrupt law is answered, so far as it looks to the case of the debtor, if honest debtors, acting in accordance with the principles of fair dealing and the equal distribution of their assets among all their creditors, are secured in the full enjoyment of the benefits of a discharge. As to such debtors, these objections, whether interposed before or after granting their discharge, will be wholly unavailing. As to fraudulent debtors, and those who would designedly violate the great principles of the bankrupt code, the statute may properly be liberally construed in favor of creditors, and to defeat unjust preferences. In the opinion of the court, the statute fully warrants the plaintiff in taking these objections in avoidance of the discharge, notwithstanding other creditors may have relied upon the same acts as a ground of opposition to the granting of such discharge originally. The further inquiry is, whether the facts shown in evidence are such as will, under the provisions of the fourth section of the statute, avoid the discharge after the issuing of the certificate. The case presents no difficulty upon the point whether a state of bankruptcy had occurred when these preferences were made. Here was not only an actual insolvency, but a discontinuance of business, by reason of such insolvency. It was not a case of payment made under the hope of continuing in business and discharging all his liabilities; but a case of conveyance made by the debtor with full knowledge of his insolvency, and after suspension of business, with the purpose of giving a preference. These facts must be considered as found by the verdict, and are quite sufficient to bring the case within the

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second section of the act. *Arnold* v. *Maynard*, 5 Law Reporter, 296, and 2 Story R. 349. *Hutchins* v. *Taylor*, 5 Law Reporter, 289. Had these facts been established before the district court, on the hearing there, no discharge would have been granted to the defendant.

But the defendant contends, that making payments and giving preferences to particular creditors, in contemplation of bankruptcy, although they might have defeated his application for a discharge, if they had been shown at the proper time, yet furnish no sufficient ground for avoiding a discharge when granted. The argument rests upon a supposed distinction in the provisions of the second and fourth sections; the defendant contending, that acts of preference to particular creditors, in contemplation of bankruptcy, are not included in the acts described in the fourth section as those that may be given in evidence in avoidance of a discharge which has been granted; and that the certificate of discharge is, notwithstanding such preference, to be held a valid and effectual bar. The language of the section is, "such discharge and certificate shall be conclusive evidence, of itself, in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property as aforesaid, contrary to the provisions of this act."

The position taken for the defendant, that the fraud here referred to is fraud at the common law exclusively, is not the true construction of the statute; but, on the contrary, all those acts, described in the second section as frauds upon the bankrupt act, are embraced in the provisions of the fourth section, which declares the causes by reason of which the discharge may be avoided. This construction seems to be entirely in accordance with the purposes of the act, and fairly within its language. It is in conformity with the decision of *Brereton* v. *Hull*, 1 Denio, 75, where it was held that the same matter may be set up in avoidance of the discharge, that might have been insisted upon against the application for such discharge. See also *Miller* v. *Black*, 1 Barr, 420. These acts

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would, under the English decisions, be held frauds upon the bankrupt system; and much more so should they be so held under ours, the second section of our statute declaring them to be "a fraud upon the act." They are therefore to be considered as embraced in the provisions of the fourth section, and when established by the proper proof, they are a good and sufficient answer to the certificate of discharge.

We think, therefore, that the ruling of the presiding judge was correct, and the discharge properly avoided by the facts found by the jury.

Exceptions overruled

ABIJAH LOCKWOOD *vs.* ASA PERRY.

A., by a writ of replevin against B., obtained possession of B.'s property, and sold it to C.: A.'s replevin suit was abated by his death, and no judgment was rendered therein: B. afterwards demanded the property of C., and, on C.'s refusal to give it up, replevied it. *Held*, that C. acquired no title to the property, by purchasing it of A., and that B. might well maintain an action of replevin against him.

REPLEVIN of two colts. The parties submitted the case to the court on the following facts agreed: On and before the 20th of April 1839, the plaintiff owned the colts replevied, and on that day H. C. Barnes sued out a writ of replevin against the plaintiff, in the county of Columbia, in the State of New York, returnable into the court of common pleas for that county; and by virtue of that writ the said colts were replevied, and delivered to said Barnes, who claimed them as his property, under an alleged contract between him and the present plaintiff, which was void by the laws of New York, where said alleged contract was made and was to be executed. The plaintiff and said Barnes then resided in said county of Columbia. The said action of replevin was tried at Hudson, in said county, in the court of common pleas there held in February 1841. The defendant in that action (the present plaintiff) made defence, on the ground that the aforesaid contract was void, and also on the ground that there had been no

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breach of it. A verdict was found for the plaintiff in that action, and judgment was rendered for him. The present plaintiff sued out a writ of error on said judgment, returnable into the supreme court of the State of New York, and that court reversed said judgment in July 1842. A new trial of said action was ordered to be had in the circuit court of said State, at its September term 1842, held at Hudson, at which term said Barnes procured a continuance of the action to February term 1843, and soon after, and before the next term of said court, died insolvent and intestate, and no administration has been taken on his estate. No further proceedings were had in said suit, and the same was abated or stopped, in consequence of the death of said Barnes, and was terminated before the commencement of this action.

Whilst said replevin suit was pending, Barnes sold said colts to the defendant, who kept possession of them until they were replevied by the plaintiff. Before the present suit was commenced, viz. in March 1843, and after the adjournment of the circuit court held at Hudson in February 1843, the plaintiff made a demand on the defendant to deliver said colts to him, and he refused. The colts never were the property of said Barnes, and he had no right to the possession of them, unless he acquired a property in them, or a right of possession, by virtue of his proceedings in his aforesaid action of replevin.

Emerson, for the defendant. 1. Barnes, by his proceedings in replevin, acquired a right to the possession of the colts. This right continued in him, or in his representatives, until his suit was terminated, and was not impaired by the reversal of the judgment in his favor. The plaintiff, therefore, could not maintain replevin against Barnes, if he were alive, nor can he now maintain such action against Barnes's representative or vendee, who stands in his place and is entitled to his rights. By the Rev. Sts. *c.* 113, § 27, and numerous decisions, a party cannot maintain a writ of replevin, unless he has the immediate and exclusive right of possession. *Wheeler* v. *Train*, 3 Pick. 255. *Collins* v. *Evans*, 15 Pick. 63. *Rogers* v *Arnold* 12 Wend. 30. 2 Saund. Pl. & Ev. 760. The

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law gave Barnes the possession and the apparent title. The right of possession resulted from his proceedings in his action; and, as a consideration for that right, he gave bond, with sureties, to indemnify the present plaintiff. Otherwise, he could not have obtained possession. *Smith* v. *M'Fall*, and *Wilson* v. *Williams*, 18 Wend. 521, 581.

A defendant in replevin, in order to acquire possession or the right of possession of the replevied property, must obtain a judgment *de retorno habendo*, and cause an eloinment to be returned, if true. He must have an adjudication on his right. *Perreau* v. *Bevan*, 5 Barn. & Cres. 284. *Hefford* v. *Alger*, 1 Taunt. 218. See also *Quincy* v. *Hall*, 1 Pick. 360. *Ilsley* v. *Stubbs*, 5 Mass. 284. *Gardner* v. *Campbell*, 15 Johns. 401. *Morris* v. *De Witt*, 5 Wend. 71.

2. There has been great laches on the part of the plaintiff. By the common law, and by the statutes of New York, he had an adequate remedy. He might have had a return of the property on a judgment as on a nonsuit; or he might have proceeded, by writ of inquiry, for damages; or he might have brought a suit on the replevin bond. *Cooper* v. *Sherbrooke*, 2 Wils. 116. *Gould* v. *Warner*, 3 Wend. 54. 1 Esp. Dig. (Gould's ed.) Part 2, p. 376. (256.) *Whitwell* v. *Wells*, 24 Pick. 32. Rev. Sts. of New York, Part 3, *c.* 8, tit. 12. *Chapman* v. *Butcher*, Carth. 248. *Badlam* v. *Tucker*, 1 Pick. 286. The action, on the death of Barnes, survived to his representative, and an administrator would have been appointed on application of the present plaintiff. *Mellen* v. *Baldwin*, 4 Mass. 480. 2 Kent Com. (3d ed.) 411.

3. Barnes had a right to sell the property and give an indefeasible title to the purchaser. He was eventually answerable to the plaintiff for its value on the replevin bond. All the English and American statutes, which provide for a defendant in replevin, imply the right of the plaintiff to sell or dispose of the replevied goods. He has the possession; and it is contrary to the policy of the law, that a right of possession should not be accompanied with a right to sell. The property may be perishable, or liable to depreciate, so that a

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specific return would be impossible; or the expense of keeping it may be great.

Replevin was originally brought to try the lawfulness of a distress for rent; and "as the end of all distresses is only to compel the party distreined upon to satisfy the debt or duty owing from him, this end is as well answered by sufficient sureties, as by retaining the very distress." 3 Bl. Com. 148. The distrainor acquired no lien on the property; for the tenant used it as his own after the replevin, and might sell it. Bac. Ab. Replevin, A. *Acker* v. *White*, 25 Wend. 614. And one purpose of the modern replevin bond is to provide for the contingency of a sale by the obligor. The objection, made in *Baker* v. *Fales*, 16 Mass. 147, to extending the action of replevin to a case of detention, where there has been no unlawful taking, was put upon the ground that thereby any person might make a compulsory purchase of another's property. And the court, in answer to the objection, said nothing about the defendant's following the property, but said, "all that can be done is to punish such abuse, when it occurs, as is done in other like cases." In *Gordon* v. *Jenney*, 16 Mass. 469, it is said by Parker, C. J. that the plaintiff in replevin may deal with the goods as his own, and may sell them. See also *Taylor* v. *Dundass*, 1 Wash. 92. *Clark* v. *Adair*, 3 Harring. 113. 1 Saund. 195, *note* (3.) 2 Saund. 286, *note* (5.)

Byington, for the plaintiff. When Barnes replevied the colts and sold them, he had no property in them, and could convey none to the defendant. If Barnes had prevailed in his replevin suit, the defendant might have defended against this action, under the judgment in the replevin suit. But as that suit was abated by Barnes's death, the defendant has no better defence now than he would have had if that suit had never been commenced.

In the cases cited for the defendant, to show that a second action of replevin will not lie, the first action was pending. Those cases, therefore, do not affect the present.

The plaintiff had no remedy on the replevin bond given to him in the first suit. The abatement of that suit by the

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death of Barnes was not a breach of the bond. *Badlam* v. *Tucker*, 1 Pick. 284. It is said the plaintiff might have had judgment, as upon a nonsuit. But a nonsuit presupposes that the plaintiff in the suit is alive. Besides; what judgment could be rendered against a dead man? The revised statutes of New York give no remedy on a replevin bond, until there has been a judgment for a return. *Cowden* v. *Pease*, 10 Wend. 333. *Cowdin* v. *Stanton*, 12 Wend. 120. And by those statutes, part 3, *c.* 7, tit. 1, an action of tort cannot be pursued, after the plaintiff's death, unless there has been an interlocutory judgment. So that the present plaintiff could have no remedy in the replevin suit brought against him in that State.

The dictum cited from 16 Mass. 469, was extrajudicial and unwarranted. Besides; the question there was between two attaching officers.

Dewey, J. The position taken by the defendant, that the object and purpose of the writ of replevin are to transfer the possession of the article replevied to the plaintiff in replevin, is certainly well maintained, if by possession be understood a possession for the time being. The further position, that the plaintiff in replevin, after the service of the writ, has a right to sell the property thus replevied, and may give to the purchaser a good, indefeasible title, which will not be affected by a judgment in favor of the defendant in replevin, is one more difficult to be sustained. If it were limited to replevin in cases of wrongful distress of personal chattels for rent, or of cattle damage feasant, it might be more readily assented to; as in such cases the property is held by the defendant in replevin for a particular purpose, and he does not claim to be the owner of it. And where the plaintiff in replevin, who in such case is the actual owner, has given the requisite security, by a bond, to pay such rent, or such damages, if the property is not returned, it may be all that is requisite to do perfect justice between such parties. Whether a like principle should be applied to the case of replevin, in its extensive use now sanctioned by the laws of Massachusetts, requires more consideration.

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The proposition is, that any one who will avail himself of the forms of law in instituting his action of replevin, merely alleging property in himself, and giving bonds, may, upon the service of the writ of replevin, sell the property replevied, absolutely and by an indefeasible title, and thus divest the real owner of his property, irrespective of the judgment in the action of replevin. The language of this court, in *Gordon* v. *Jenney*, 16 Mass. 469, is strongly relied upon as sustaining such a doctrine. Taken literally, and without any restriction to its application to the facts before the court, it would sustain that view of the question. But, as it seems to us, it is to be qualified by reference to the circumstances of that case. The plaintiff in replevin was there insisting upon his right to recover damages, by reason of a deterioration of the value of the goods pending the action of replevin. In answer to this claim, the court say, he is entitled to no damages on this account: "He may sell them. They are delivered to him upon the assertion that they are his property, and he has it in his power to deal with them as such." But the case before the court was that of a plaintiff in replevin who was the real owner of the property replevied. That had been already settled. Such a plaintiff in replevin may, of course, deal with the goods replevied as his own. He has the possession and the right of property, and therefore all the facilities, and all the legal rights too, requisite to make a legal transfer. In ordinary cases, the purchaser buys subject to the question of the vendor's title; and we think none the less so because the vendor has acquired his possession under a writ of replevin issued upon his own representation, and which may be wholly unfounded in truth. We perceive no sufficient reason for sanctioning the broad doctrine, that by reason of the mere fact that he has acquired his possession through the instrumentality of a writ of replevin, his vendee has acquired thereby an indefeasible title as against every body. It is doubtless true that the plaintiff in replevin has, by virtue of his writ, acquired the right of possession pending the action of replevin, and that the real owner cannot lawfully disturb that right

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during the pendency of the action, nor institute an action against a third person who may become possessed of the goods. And this is precisely the extent of the right exercised by force of a writ of replevin. This view of the question is fatal to the defence, as presented upon the general position, that by virtue of the writ of replevin and giving of bonds to prosecute the same, the property absolutely vested in the plaintiff in replevin.

The defendant, however, further insists, that before the defendant in replevin can, in any case, be entitled to a return, or be authorized to regain the possession, by any legal process, he must have a judgment for a return; the judgment *de retorno* must actually be entered. That principle, so far as it applies to the institution of an action on the replevin bond, looking to that as the remedy, seems to be well sustained. *Cowdin* v. *Stanton*, 12 Wend. 120. But the further inquiry is, whether a discontinuance of the suit may operate to defeat a right of possession of a chattel acquired under a writ of replevin, and having no other foundation besides that which results from such writ. Such, we think, may be the effect; and if the defendant in replevin is content to resort to the property itself, and to forego his remedy upon the bond, he may, upon the discontinuance of the suit by the plaintiff in replevin, avail himself of his antecedent title, as the lawful owner, to regain the possession, although he may not have a formal judgment for a return of the property.

The next question is, whether there was any such termination of the action of replevin brought by Barnes against the present plaintiff. The case stated by the parties finds that the action was abated by the death of Barnes, and the case terminated before the institution of the present action of replevin. Such being the fact, the right of possession acquired temporarily by Barnes ceased, and the real owner was no longer prevented from regaining possession of his property, which had been unjustly taken from him, through the instrumentality of a process in replevin, by one having no claim thereto. *Judgment for the plaintiff.*

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FREDERICK M. INGERSOLL *vs.* THOMAS B. STRONG & another.

Under the Rev. Sts. c. 98, when charges of fraud are alleged against a party who seeks to take the poor debtors' oath, and the examining magistrates render a judgment in his favor, it is their duty to administer the oath to him, and to make a certificate thereof to the jailer, although the creditor appeals from their judgment; and the debtor is thereupon to be discharged from imprisonment, or, if he is at large on bail when the oath is taken, his bail are thereby discharged.

THE plaintiff's declaration alleged that he, on the 25th of July 1845, caused Henry Marsh to be committed to the jail in Lenox, in the county of Berkshire, upon an execution which issued on a judgment obtained in the supreme judicial court, by the plaintiff, against said Marsh, for the sum of $919·75, and that said Marsh, on the 26th of said July, caused the plaintiff to be cited, in due form of law, to appear at the jail house in said Lenox, on the 30th of said July, to show cause why said Marsh should not have the benefit of the law for the relief of poor debtors; at which time and place the plaintiff and said Marsh appeared, and Charles Sedgwick, one of the justices of the peace and of the quorum within and for said county, appeared as one of the examining magistrates in the case, and adjourned the examination and hearing of said Marsh, upon his application for the benefit of the said law, to the 31st day of said July, at the same place; at which time and place last aforesaid the plaintiff appeared, and the said Sedgwick and Thomas B. Strong, both justices of the peace and of the quorum within and for said county, appeared as the examining justices in said case, and opened the court for the examination of said Marsh upon his application aforesaid, and to hear him and the plaintiff in the premises; at which time the plaintiff opposed the discharge of said Marsh, and filed the following charges of fraud: *First*, that since the debt was contracted in the above case, said Marsh has fraudulently conveyed, or concealed, or otherwise disposed of his estate, or some part thereof, with design to secure the same to his own use, or to defraud his creditors: *Second*, that said Marsh has wilfully expended his goods and estate, or some

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part thereof, for the purpose of enabling him to swear that he has not any estate, to the amount of twenty dollars, excepting such as is exempt from being attached or taken on execution: *Third*, that said Marsh contracted the debt aforesaid with an intention not to pay the same: That said charges were subscribed by the plaintiff, and sworn to by him before a justice of the peace within and for the county aforesaid, and were offered to said magistrates, and filed in the case: That the plaintiff, at the same time and place, filed specifications of fraud, (which were set forth in the declaration,) under the first charge aforesaid, which specifications were received and filed by the said justices: That said justices, after an examination of witnesses, offered by the plaintiff, and sworn, decided that the charge of fraud against said Marsh was not sustained, and that he was not guilty thereof; and that they, "being satisfied, from the examination of said Marsh, of the truth of the facts set forth in the oath prescribed to be taken by poor debtors," offered to administer said oath to him: That the plaintiff objected to this proceeding, and claimed an appeal from the judgment of said justices to the court of common pleas, and offered to recognize, as the statute prescribes, to prosecute his appeal with effect; whereby all proceedings of said justices, in the premises, were by law stayed: Yet said justices, (the defendants,) being of opinion that the appeal did not preclude said Marsh from taking the poor debtors' oath, then and there administered said oath to him, and made out, under their hands, in due form of law, a certificate to the keeper of said jail, that they had administered the same; whereupon said keeper immediately discharged said Marsh from custody: That the plaintiff, within twenty four hours after the rendering of the judgment aforesaid by said justices, recognized with sureties, as the law directs, to prosecute his said appeal with effect: That all the said proceedings of the defendants, after the said appeal was claimed by the plaintiff, were unauthorized by law, and a grievous injury to him, inasmuch as said Marsh was thereby taken from the custody of the law, and set at liberty beyond the control or reach of the plaintiff,

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whereby he has wholly lost the benefit of his said judgment against said Marsh, &c.

The defendants demurred to this declaration, and the plaintiff joined in demurrer.

Rockwell, in support of the demurrer. The declaration is bad, because it contains no allegation of corruption or fraud in the defendants, but sets forth merely an error of judgment. *Butler* v. *Potter*, 17 Johns. 145. *Griffin* v. *Mitchell*, 2 Cow. 548. *Phelps* v. *Sill*, 1 Day, 328, 329. *Gregory* v. *Brown*, 4 Bibb, 28. *Dillingham* v. *Snow*, 5 Mass. 559. *Tompkins* v. *Sands*, 8 Wend. 462. *Millard* v. *Jenkins*, 9 Wend. 298. *Moor* v. *Ames*, 3 Caines, 170. *Brodie* v. *Rutledge*, 2 Bay, 69. *Yates* v. *Lansing*, 5 Johns. 282. 1 U. S. Digest, Actions, 228. The question before the defendants respected the effect of the plaintiff's appeal; and this was a judicial question, viz. whether they had jurisdiction to administer the poor debtors' oath to Marsh. *Gray* v. *Cookson*, 16 East, 13.

But the defendants decided this question rightly. The Rev. Sts. *c.* 98, §§ 8, 10, require, that if the examining justices shall be satisfied of the truth of the facts set forth in the oath to be taken by the debtor, and in the certificate to be made by them, "they shall administer to him the oath," and "shall make a certificate thereof," in the form which was adopted by the defendants in this case. The sections which the legislature added to this chapter as reported by the commissioners, relating to charges of fraud against the debtor, and an appeal from the justices' judgment on the trial of those charges, do not control the foregoing provisions. If it be objected, that it is provided by § 36, that if the debtor, on the final trial, shall be found guilty of any of the said charges, "he shall have no benefit from the proceedings under this chapter," and therefore the legislature meant that he should not be admitted to his oath until after a trial and acquittal on the appeal; the answer is, that a like provision is made by § 15, when the debtor, after being discharged, shall be convicted of having wilfully sworn falsely upon his examination before the justices. The provisions of *c.* 98, as to

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charges of fraud, cannot be consistently carried into effect, except by regarding them as entirely collateral to the former provisions; leaving the justices to administer the oath, if they do not find the charges supported.

Robinson, for the plaintiff. The plaintiff's cause of action is, that the defendants have done an act, without legal authority, which was injurious to his interests. No corruption need be alleged. The question is, whether the defendants could legally administer the oath. The provision in § 8 of *c.* 98, relied on by them, must be taken in connexion with the subsequent sections in the same chapter, and with subsequent *Sts.* of 1842, *c.* 56, and 1844, *c.* 154. By § 36 of *c.* 98, the debtor is to have no benefit from the proceedings, if he is found guilty of any of the charges, "upon a final trial." He cannot take the oath until after a hearing; and when an appeal is taken, the final and full hearing must be had on the appeal. But Marsh has already had one of the benefits of the proceedings, by being let out of jail.

The act of administering the oath was not a judicial act. The defendants had no judicial power, except to try the question of fraud; and they are not answerable for their decision of this question. After they had decided it, the plaintiff's appeal took from them all power to proceed further. *Paine* v. *Cowdin*, 17 Pick. 142. Their grant of the certificate was a ministerial act, like that of a justice in issuing an execution after an appeal from his judgment. For their unwarranted acts, they are liable to the plaintiff. *Briggs* v. *Wardwell*, 10 Mass. 356. *Smith* v. *Rice*, 11 Mass. 513. *Phillips* v. *Biron*, 1 Stra. 509. 3 Dane Ab. 100.

Dewey, J. We have not found it necessary to consider the question whether the defendants were not so far acting judicially, in the matter before them, as to be protected from all claims for damages resulting from mere error of opinion, and where no fraud or corruption is imputed. Our attention has been particularly called to the construction of the provisions of the Rev. Sts. *c.* 98, and the supplementary act of 1844, *c.* 154, and in reference to the duty of the magistrates, on a

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hearing upon an application of a poor debtor who is desirous of taking the oath prescribed in such cases, when the creditor has availed himself of the privilege, given by statute, of alleging specific charges of fraud against the debtor, and the magistrates, upon the hearing thereof, are of opinion that the charges of fraud are not maintained, and the creditor has appealed from such judgment to the court of common pleas. The precise point of the inquiry is this: Are the magistrates to proceed to the administration of the poor debtors' oath, when the creditor claims an appeal? Looking merely at the provisions of Rev. Sts. *c.* 98, §§ 6–10, there would seem to be no room for doubt in the matter. The course of proceeding, and the duties to be performed by the magistrates, are plainly stated, and would seem to require the administration of the oath in all cases where, in their opinion, the party is entitled to take the same. The difficulty arises from the attempt to engraft upon the old and familiar system of proceedings, on a poor debtor's application to take the oath, certain new and more stringent provisions in regard to his fraudulent acts, accompanied with the provision that either party may appeal from the adjudication of the magistrates to the court of common pleas. The argument is strongly pressed upon us, that § 32 of *c.* 98, by giving the right of appeal to the creditor, necessarily operates to supersede all further jurisdiction on the part of the magistrates, and precludes all further proceedings by them as to administering the oath to the debtor, and filing a certificate of the same. No such effect is directly declared by the statute; but it is contended that, upon general principles applicable to appeals which are legally taken, it supersedes all further action in the court appealed from. Ordinarily, this is undoubtedly the case; yet the court appealed from is sometimes authorized to render judgment and issue execution, though the appeal is carried forward. It is so in the case of exceptions in matter of law, when they are deemed frivolous by the court. It may be said that, in the case specified, this course of proceeding is expressly authorized by statute, and that in the present case, no similar provision is found. This is so; and therefore the authority to administer the oath and

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file the certificate, notwithstanding the appeal, must here be derived from inference rather than from direct enactment. The general purpose of the statute is that of releasing the body from imprisonment, where the debtor has no property, and has been guilty of no fraud. The whole course of recent legislation has been to facilitate the discharge of poor debtors entitled to take the oath; and this is particularly true as to the reduction of the period of time during which the debtor may be confined, before he is allowed to take the oath.

It is said, however, on the part of the plaintiff, that the entire benefit of the provisions of the statute which denies a discharge to fraudulent debtors, and gives to the creditors a right of appeal on the question of fraud, cannot be attained without the detention of the body of the debtor in imprisonment, or, if he be at large, under a bond conditioned for his surrender. This is true; and to some extent, the benefits of an appeal may be lost by permitting the discharge of the debtor before the hearing on the appeal. But it is to be remembered that he is only to be thus set at liberty, after a hearing and adjudication in his favor by two magistrates of the county. Again; without the present detention of the body of the debtor, the creditor might, if he sustained his case, upon the hearing of the appeal, in the court of common pleas, derive a substantial benefit in the reversal of the judgment of the magistrates, as he thereby acquires the right to make a subsequent arrest of the body of the debtor, and the debtor is made subject to punishment for the fraud, if duly convicted thereof in the court of common pleas.

It must be conceded, nevertheless, that without the detention of the body of the debtor to abide the final judgment on the question of fraud, the creditor has not, to the fullest extent, the benefits of an appeal. But, on the other hand, we are to look at the consequences of a construction of the statute, which would give it the effect contended for by the plaintiff; and if we find such construction attended with still greater objections, and occasioning an extended imprisonment of the debtor, continuing, it may be, for years, we are not to disregard such considerations, when inquiring into the probable

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design of the legislature in making the provision for an appeal. The ground assumed by the plaintiff is, that upon an appeal being taken by him, the magistrates cannot administer the oath to the debtor, or properly file the certificate of such oath. What is the consequence of this doctrine? The practical effect would be, that instead of that prompt discharge which the policy of our legislature clearly indicates, a procrastination for a very extended period is placed in the power of the creditor. Every creditor may allege fraudulent acts to have been committed by his debtor, and, having made this allegation, he may exercise his right of appeal, although he produced not a tittle of evidence before the magistrates, to sustain his charge; and thus the debtor, however honest and however proper a subject for the oath and a certificate entitling him to discharge from imprisonment, must be delayed of his discharge, and, if unable to give bonds for the prison limits, must be confined in close prison until the convenient time arrives for a hearing in the court of common pleas, and even beyond this, as the case may be carried to the supreme judicial court on exceptions taken to the ruling of the court of common pleas in matter of law. Thus years may elapse before the time arrives for taking the oath, and obtaining the discharge of his body from imprisonment. We cannot suppose that the legislature intended to introduce such a change in the system of imprisonment of poor debtors, and one so much at variance with the general course of legislation on this subject. We have come, therefore, to the opinion, that it is the duty of the justices convened on the petition of a poor debtor seeking to take the oath, when specifications of fraud are filed by the creditor, to pass upon such allegations of fraud, and, if they find them unsupported by proof, to declare their judgment to that effect, by administering the oath to the debtor and filing the proper certificate, although an appeal be taken by the creditor; and that upon such proceedings being had, the debtor may properly be discharged from imprisonment; and that if he is at large on bail when the oath is taken, his bail will be thereby discharged from their liability. *Declaration adjudged bad.*

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John Ostrom *vs.* Brinton Jacobs & another.

In a suit against surviving partners, to recover the amount of a note given by the deceased partner in his single name, his declarations that the transactions for which the note was given were for the partnership business, and that it was a company note, are not admissible in evidence, if there be no evidence *aliunde* that those transactions were for the partnership.

Nor is evidence admissible, in such suit, that one of the surviving partners, after the death of the partner who signed the note, recognized the note as one which the firm were bound to pay, and attempted to borrow money to pay it, and offered to take it up and give the note of the survivors in lieu of it, if it be not shown that this was known or consented to by the other survivor.

When, in such suit, there is no evidence that the surviving partners, before the death of the other partner, had knowledge of, or gave consent to, his giving notes in his own name alone for the debts of the firm; and there is evidence that he, when he gave such notes, charged the amount thereof against the firm, as cash; and also evidence that the plaintiff knew of the partnership, and made charges against the firm, in other cases; the declarations of the deceased partner, when he borrowed the money for which the note was given, are not admissible in evidence against the survivors.

Assumpsit for goods sold and delivered, work done and materials found, and money had and received. The defendants were described as "surviving partners of Philo Upson, deceased, and, as such partners, trading under the firms and styles of Philo Upson & Company, and Jacobs, Conrog & Company." The plaintiff filed, as a bill of particulars, copies of two promissory notes, signed by Philo Upson, payable to the plaintiff on demand, with interest; one dated March 30th 1839, for $550; the other dated April 29th 1839, for $1000. At the term when the trial was had, the plaintiff filed two new counts, one on each of said notes, alleging that Brinton Jacobs and John Conrog (the defendants) and Philo Upson, by their promissory note in writing, made and signed by the said Upson, promised the plaintiff to pay him, &c.

At the trial before *Hubbard*, J. the plaintiff, to prove the partnership of Jacobs, Conrog & Upson, gave in evidence the affidavit of Jacobs & Conrog, dated November 14th 1840, relating to the accounts between them and Upson, and filed with the commissioners to examine the claims on his estate. in which they called themselves two of the late firm of Jacobs, Conrog & Upson, in the marble business. The plaintiff

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also called R. R. Root as a witness, who testified that he was the clerk and agent of Upson, in the business in which he was engaged with Jacobs & Conrog — which was the quarrying of marble, and shipping it at Hudson for Philadelphia, under a contract with the trustees of the Girard College, to furnish the pillars for that institution; that the business was large; that Upson resided in Egremont, near the quarry; that he was the active partner there, and had the supervision of all the business, and hired the men to carry it on; that he purchased the oxen and horses that were employed in the business, and bought the hay and grain on which they were fed; that he gave notes for the articles purchased for the use of the firm, signed with his own name only; that the witness never knew him to give a note in the name of the firm; that the witness knew Upson's mode of doing business from October 1838 to January 13th 1840, when he was lost in the steamboat Lexington.

It also appeared that Upson procured funds for the use of the company by drafts on Jacobs in Philadelphia, which were discounted at the Housatonic Bank in Stockbridge; and that, in the summer of 1839, the partners in Philadelphia were in advance to Upson about $7000, and at the close of the year about $3500. There was no evidence that those partners ever knew or consented to Upson's giving notes in his own name for the use of the company. The articles purchased as aforesaid, and the debts paid by Upson's notes, were charged as cash, in his account with his partners.

The plaintiff offered to give the declarations of Upson in evidence, to show that the transactions, for which the notes in suit were given, were for the partnership business, and that they were company notes. But, the fact not being established *aliunde* that said transactions were partnership ones, the evidence was rejected.

There was evidence tending to show that the plaintiff let Upson have money, to the amount of the notes in suit, on the days of the dates of the notes, and that said money was paid by Upson, in discharge of debts of the company. Evidence

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was also given, that Upson was extensively engaged in business on his private account, and that the plaintiff lived within five miles of him, and was acquainted with his business.

John F. Collier, a witness called by the plaintiff, testified, that in April 1840, after Upson's death, Jacobs came from Philadelphia to Egremont, where Upson lived, and to Hillsdale, (N. Y.) the adjoining town, where the plaintiff lived; and that Conrog came there in October 1840; and the plaintiff offered to prove, by this witness, that the defendant Jacobs recognized the notes then held by the plaintiff as notes which the firm were liable to pay, and stated that he was not then prepared to pay them, but wished to borrow $1000 of the witness, to pay on account of the notes, and offered to take them up and give the notes of the survivors in lieu of them. But, as the plaintiff did not propose to give any evidence that Conrog, the other defendant, knew or consented to this, the testimony was rejected.

It was in evidence that there was a third note for $500, given by Upson to the plaintiff for the moneys due to him for keeping the cattle of the firm, which note was outstanding at the time of Upson's death; and also another note of $57, given on settlement of an account of the plaintiff for grain; which account was made out by the plaintiff to Philo Upson & Co. This last note was proved to have been paid by Jacobs, in 1840.

The plaintiff offered to prove, by a witness, the declarations of Upson, when he applied to borrow the $1000 of the plaintiff, for which one of the notes in suit was given; but the testimony was rejected.

In consequence of the rejection of the evidence offered at the trial, the plaintiff became nonsuit. Nonsuit to be set aside, and a new trial granted, if the evidence was wrongly rejected; otherwise, the nonsuit to stand.

Bishop, for the plaintiff.

Sutherland of Hudson, (N. Y.) & *Byington*, for the defendants.

The opinion of the court was delivered at September term 1846.

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DEWEY, J. The question is, whether the evidence offered by the plaintiff was rightly rejected by the judge. The issue was as to the joint liability of Brinton Jacobs and John Conrog with Philo Upson, on the notes sought to be recovered. The notes, on the face of them, purported to be signed by Upson alone. The evidence which was offered and admitted tended to show a limited partnership between the defendants and Upson in the business of furnishing marble for the Girard College. The name of the firm, as set forth in the writ, was Philo Upson & Co. and Jacobs, Conrog & Co.

Had the notes been executed under the name of Upson & Co., or Jacobs, Conrog & Co., the great difficulties arising in the case would have been obviated. But such was not the case; and the further fact is found, that Upson was extensively engaged in business on his own private account. The question then arises upon the competency of the proof, which was rejected, to establish the liability of the defendants upon *these notes.*

The plaintiff offered, *first*, to give in evidence the declarations of Upson, to show that the transactions for which the notes were given were for the partnership business, and that the notes were company notes. This evidence was, as we think, properly rejected, under the various decisions that have been made, and especially in our own court. The case directly in point is that of *Tuttle* v. *Cooper*, 5 Pick. 414, establishing the position, that the admission of one of the parties alleged to be partners is incompetent to show that a note was a partnership transaction. In *Robbins* v. *Willard*, 6 Pick. 464, although *prima facie* evidence of a partnership had been given, yet it was held that the declaration of one of the parties was not competent evidence to establish the partnership. Now the whole inquiry here was, whether these were partnership notes. Nothing on the face of them indicated that they were such. The objection to the competency of the declarations of Upson to charge this upon the partnership is the same in principle as if his admissions were offered to establish the fact of a partnership; inasmuch as that fact was unavailing, unless

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these notes were given by the partners. This evidence was, upon principle and authority, properly rejected.

The plaintiff then offered to show, *secondly*, that at some period after Upson's death, Jacobs, one of the defendants, "recognized" these notes as notes which the firm were liable to pay, wanted to borrow money to pay them, and offered to take them up and give the notes of the survivors in lieu thereof; but the plaintiff not proposing to offer any evidence that Conrog, the other defendant, had any knowledge of this, or gave any consent thereto, the evidence was rejected. This point of the ruling is undoubtedly more questionable. The evidence offered was the admission of one of those not interested to give to these notes a partnership character, and thus to release Upson from two thirds of the liability. It is the admission of a party against his own interest, and therefore, upon general principles, would be admissible. But the difficulty arises from the application of the evidence to the peculiar state of the parties to this action. It is a joint action against Jacobs & Conrog; and the attempt is to establish the joint liability of these parties by the admissions of Jacobs, after the dissolution of the partnership (if any existed) by the death of Upson. Now, whatever effect might be given to the admissions of Jacobs, to charge himself as a partner with Upson, most clearly Jacobs can no more, by his admissions, charge Conrog as a partner in a firm of Upson, Jacobs & Conrog, than Upson could, by his admissions, charge Conrog, or both Jacobs & Conrog. The fact that Jacobs & Conrog may be jointly interested, as partners, in certain other matters, does not affect the present question, or give any greater legal effect to the admissions of Jacobs, than if such other connexion did not exist. The court are therefore of opinion, that the proposed evidence of the admissions of Jacobs was not competent to charge Conrog.

The further declarations of Upson, at the time he applied for the loan, were also, under the circumstances of the present case, inadmissible. The note was not made in any partnership name assumed by the firm or recognized by the other

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partners. The report of the case states that there was no evidence that, prior to the death of Upson, the defendants had any knowledge of, or consented to the giving of, notes in his name alone, for partnership liabilities. It further finds that, whenever Upson gave his personal note for articles purchased for the partnership, he charged the amount of such note against the firm, as cash paid for them. It also finds that the plaintiff knew of the partnership, and had made charges against them as a company. Upon these facts, the taking of the individual note of Upson must be considered a credit to him, and does not create a liability on the part of the defendants. *Green* v. *Tanner*, 8 Met. 411.

Nonsuit to stand.

ASAHEL BUCK, JR. *vs.* FRANKLIN O. SAYLES & others.

The provision in *St.* 1844, *c.* 178, § 9, that notice shall be given to a party, and that he shall have an opportunity to be heard, before a warrant is issued, on the petition of his creditor, to seize his property as that of an insolvent debtor, applies not only to a petition that sets forth any of the causes for such warrant which are enumerated in that statute, but also to a petition which sets forth any of the causes which are enumerated in the previous *St.* of 1838, *c.* 163.

THIS was a bill in equity, in which the plaintiff alleged that, on the 24th of May 1845, Franklin O. Sayles, a master in chancery, on the petition of Daniel T. Buck, a creditor of the plaintiff, issued a warrant against the plaintiff, commanding the sheriff of Berkshire, or either of his deputies, to take possession of the property of the plaintiff, and to keep it safely, until an assignee or assignees thereof should be appointed, according to the provisions of the insolvent laws of this Commonwealth: That the alleged ground of said petition to said Sayles was, that property of the plaintiff had been attached on mesne process, in a civil action founded upon a demand, proveable against the estate of an insolvent debtor, for more than one hundred dollars, and that the plaintiff had not, within fourteen days from the return day of the writ or

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which said property was attached, dissolved said attachment in the manner provided in *St.* 1838, *c.* 163, § 20: That Lyman Hall, a deputy of the sheriff of Berkshire, on the 27th of May 1845, by virtue of said warrant, took possession of the plaintiff's property, and forthwith gave public notice, as prescribed by law, that said warrant had issued, and in the same notice called a meeting of the plaintiff's creditors, to be held on the third Monday of June 1845, to prove their debts and to choose one or more assignees of the plaintiff's estate.

The prayer of the bill was, that said warrant, so issued by said Sayles, and all proceedings thereon, and all services and notices made and given by said Hall, and all proceedings, acts and doings of said Sayles and Hall, or of any other persons, by virtue of said warrant, might be set aside and annulled; and that said Sayles might be enjoined and prohibited from further proceedings; and that a writ of subpœna might issue, directed to said Sayles and Hall, and to said Daniel T. Buck, commanding them to appear, &c.

Among the allegations, in the bill, which formed the ground of the prayer thereof, was the following: That the warrant therein mentioned was issued by said Sayles, without ordering or giving any notice to the plaintiff of the presentment of the petition therefor, contrary to the provisions of *St.* 1844, *c.* 178, § 9.

The bill was filed on the 5th of June 1845, and *Dewey*, J. thereupon issued an injunction, to remain in force until the further order of this court, or some justice thereof, dissolving the same.

The answers of the defendants admitted the allegation in the bill, that the said warrant was issued without notice to the plaintiff.

Rockwell, for the plaintiff, now moved that the injunction be made perpetual; and the court called upon the defendants' counsel to show cause why the motion should not be granted.

Robinson & Byington, for the defendants. Under *St.* 1838, *c.* 163, notice to the debtor was not necessary, before issuing a warrant for the seizure of his property. *Kimball* v. *Morris*,

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2 Met. 573. *Wheelock* v. *Hastings*, 4 Met. 504. The *St.* of 1844, *c.* 178, § 9, adds to the causes enumerated in *St.* 1838, for proceeding against a debtor *in invitum*, certain other causes, and provides that, when any of those additional causes are stated in a petition for a seizure of the debtor's estate, notice of the petition shall be given to the debtor, and a hearing granted to him, before a warrant to seize his estate shall be issued. These new causes all regard the *intentions* with which the debtor does certain acts; and he *therefore* is entitled to an opportunity to make explanations. But no provision is made for notice, when the creditor proceeds, as in the case at bar, on a cause enumerated in *St.* 1838. Indeed, by § 12 of *St.* 1844, the creditor is expressly authorized, in case of a debtor's not dissolving an attachment, to proceed "in the manner provided for in said act" of 1838. The creditor has so proceeded in this case.

Shaw, C. J. The successive statutes for the relief of insolvent debtors, and a more equal distribution of their effects, being avowedly made in amendment of the original act of 1838, they must be construed together, as statutes *in pari materiâ*, and must be so construed, if practicable, as to constitute one entire and harmonious system of regulations. The *St.* of 1844, *c.* 178, is entitled an act in further addition to the original act. It provides, § 9, that in addition to the causes enumerated in the original act, in which proceedings may be commenced by creditors against the will of the debtor, certain other causes stated shall be deemed sufficient, upon which any creditor may by petition apply, &c., as in the original act. It then adds, "and thereupon the judge of probate or master in chancery, after notice of the presentment of the petition, given to the debtor, &c., if the facts set forth in the petition shall appear to be true, shall issue his warrant." The question is, whether this clause requires notice to the debtor, when the cause for proceeding is one of those enumerated in the old statute, which did not require notice before issuing the warrant. The question is not without difficulty. But, taking the two statutes together and believing that the legis-

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lature intended that the proceedings should be uniform and alike in all similar cases, and there being no apparent reason why previous notice should be given in one case and not in the other, the court are of opinion, that when the *St.* of 1844 refers to certain cases in which the creditors may proceed adversely, and then adds certain others of a like kind, they are all to be taken as a class; and then, when it is directed that notice shall be first given, such direction applies to the whole class, and not to the additional causes only. The court are therefore of opinion that the warrant in this case issued prematurely; that the master had not jurisdiction; and that the injunction to stay all proceedings must be made perpetual

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Worham L. Fitch *vs.* Bavil Seymour.

A. orally requested B. to erect a mill dam, and orally promised him that if the dam should flow his land, he would not claim damages for the flowing: B. built a dam and mill, and flowed A.'s land, and afterwards conveyed the dam and mill to C., who continued to flow the land: A. entered a complaint against C. to recover damages for this flowing, and it was decided that he had waived his right to damages, by his agreement with B., and could not recover: A. afterwards conveyed his land to D., with a covenant that it was free from all incumbrances, and D. brought an action against him for breach of this covenant, alleging the right of C. to flow the land without payment of damages. *Held*, that C. had no such right, as against D., by virtue of A.'s oral agreement with B., and that no breach of the covenant was shown.

This was an action of covenant broken, brought on a deed of bargain and sale, dated October 3d 1838, by which the defendant conveyed to the plaintiff a tract of land in Otis, with warranty, and with a covenant that the same was free of all incumbrances. The plaintiff alleged, as a breach of this covenant, a third person's right to flow, without paying damages, a part of the land, by means of a mill dam, erected by Israel A. Jones in 1825, and ever since kept up.

At the trial in the court of common pleas, before *Ward*, J. the plaintiff, for the purpose of showing the right of the owner of the dam and the mill therewith connected to flow said land, introduced the depositions of Israel A. Jones and Jon-

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athan N. Wright. Said Jones deposed, that he erected said dam in 1825, and that, before it was erected, the defendant requested and urged him to build it and erect a mill for the benefit of the neighborhood, and promised that, if it should overflow his land, he would not ask any damages; but that the defendant made "no contract nor stipulation in writing relative to the flowing of his land." Said Wright deposed, that the defendant, some time after the dam and mill were built, told him that he (the defendant) "thought, when he gave the privilege to erect the dam, that the benefit of having a mill in the place would compensate him for the flowing of his land."

The plaintiff also introduced, without objection from the defendant, the record of the proceedings had on a complaint brought by the defendant against William Carter, (to whom the dam and mill were conveyed by Israel A. Jones in 1831,) for flowing the land by means of said dam, as reported in 2 Met. 520. Evidence was then introduced, by both parties, as to the diminution of the value of the plaintiff's land, by reason of the flowing thereof by said dam.

The defendant then offered in evidence a mortgage deed, given to him by the plaintiff on the 3d of October 1838, to secure payment of notes (some of which were still unpaid) given by the plaintiff to him as the consideration of the defendant's deed aforesaid, of the same date, to the plaintiff. This mortgage deed contained the same covenants which were contained in the defendant's deed to the plaintiff; and the defendant contended that it was a bar to the plaintiff's recovery in this action. But the judge ruled that it was not.

The defendant also insisted, that the plaintiff's evidence did not show a legal incumbrance on the land, which entitled the plaintiff to recover. But the judge instructed the jury, that they should find a verdict for the plaintiff, for his damages, if they believed the evidence adduced by the plaintiff. The jury found a verdict for the plaintiff, and the defendant alleged exceptions to the judge's ruling and instruction.

Bishop, for the defendant. A right to flow land for working a mill is given by the mill act. No grant, therefore, is

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necessary to create this right; and the law does not regard it as an incumbrance, so long as a claim to compensation exists. The plaintiff is entitled to compensation. The defendant's paro relinquishment of damages does not bind his grantee. The case of *Seymour* v. *Carter*, 2 Met. 520, which was before the court on the same facts that exist in this case, decided only that Seymour could not, under the mill act, recover damages of Jones's grantee. He had waived his demand. But this waiver, being by parol, does not bind his grantee of the land. It was his individual engagement, and did not attach to the land. The *St.* of 1795, *c.* 74, made provision for annual damages only; and no statute, until after the dam in question was erected, provided for gross damages. The defendant, therefore, received or waived nothing more than *his* claim to annual damages. The annual claim runs with the land. It may have been ascertained, prospectively, by a jury; but it is payable to the owner, for the time being, of the land flowed. A perpetual right to flow without compensation is an easement, which can be created only by grant, or deed recorded, so as to bind a purchaser without notice.

The plaintiff's mortgage deed to the defendant, of even date with the defendant's deed containing the covenant alleged to be broken, is a bar to this action. So far as regards the plaintiff, the defendant has title and right to possession of the land, subject to be defeated only by performance of the condition of the mortgage. *Erskine* v. *Townsend*, 2 Mass. 495. *Goodwin* v. *Richardson*, 11 Mass. 469. *Flagg* v. *Flagg*, 11 Pick. 477. *Blanchard* v. *Brooks*, 12 Pick. 47. *Fay* v. *Cheney*, 14 Pick. 399.

Sumner, for the plaintiff. The doctrine contended for by the defendant is, that a land owner may encourage his neighbor to build a mill, by a promise which will estop him to claim damages for flowing, but may sell his land, after the mill is built, for a consideration equal to its value without incumbrance; and that his grantee may sustain a complaint against the mill owner, under the mill act. If this be so, then full compensation, made to a land owner for a perpetual

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right to flow his land, would leave him to sell his land for the like value, and enable his grantee to maintain a like complaint. This is too unjust to the mill owner to be supported by law. *Lex nemini facit injuriam.*

By *Sts.* 1795, *c.* 74, and 1797, *c.* 63, if the land owner give the mill owner a right to flow without payment of damages, or for an agreed composition, whether orally or otherwise, then, it is submitted, the entire rights of the mill owner become fixed, not only in himself, but in his heirs and assigns, against all claim for damages that can be set up by the land owner, his heirs and assigns.

In *Seymour* v. *Carter*, 2 Met. 520, Jones's assignee of the mill met Seymour's complaint by setting up his contract with Jones. This shows that the contract was something more than an individual engagement, and that it did attach to the land, and became a vested right which passed from Jones to Carter, and is a right now held by Carter, not only against Seymour, but also against his grantee. If Seymour waived nothing more than his claim to annual damages, why did he not recover gross damages on his complaint against Carter?

The case is analogous to that of land taken for a highway. Only the owner of the land at the time of the laying out of the way can claim damages. He receives them, and an easement is fixed upon the land. And the easement is equally fixed, if he gives the land for the benefit derived from the way; fixed not only against himself, but against his heirs and assigns, even though no deed or writing be executed by him. And if he afterwards conveys the land, with a covenant that it is free of incumbrance, he is liable in an action of covenant broken. *Kellogg* v. *Ingersoll*, 2 Mass. 97. *Prichard* v. *Atkinson*, 3 N. Hamp. 335.

No authority is cited to sustain the objection which is raised from the plaintiff's mortgage against his maintenance of this action. It is not for the defendant to say that his covenants are a nullity, merely because the plaintiff has given him a mortgage as collateral security for the payment of the notes which were given to him as the consideration of those

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covenants. A mortgagee has a complete legal title only so far as it is necessary to enable him to enforce his right to the estate as a pledge for the security of his money. *Blanchard* v. *Brooks*, 12 Pick. 57. While a mortgage continues a pledge, it is a mere incident to the debt, and, to most purposes, a chattel interest following the nature of the debt. *Goodwin* v. *Richardson*, 11 Mass. 472, 473. The defendant, by his deed to the plaintiff, undertook to convey to him such a fee simple estate as to enable the plaintiff to hold it against all others, free from all incumbrances except the mortgage in question. The plaintiff, then, ought to have a right to sell the land with perfect power to enter into covenants against every other incumbrance. This he cannot do, because of the right to flow, given by the defendant to Jones and his assigns. For this incumbrance he has the remedy which he now seeks.

The opinion of the court was delivered at September term 1846.

Shaw, C. J. The court are of opinion that the facts do not show that the land conveyed with warranty was charged with any incumbrance or service, by the parol agreement of Seymour, made when the mill was built, that he would not claim damages. Strictly speaking, the right given by the mill acts to the mill owner is not that of flowing, or making any other direct use of his neighbor's land adjacent to the stream, above his own, but only to raise a dam on his own land, to a height sufficient to raise a suitable head of water, and to continue the same to his own best advantage, although the land of another is thereby flowed. We do not, however, mean to say that a right to keep up such head of water, without payment of damages, may not, under some circumstances, be an incumbrance on the land. Such a charge might be created by grant; but such a grant would be the grant of an easement, or interest in land, and could only be made by writing. Rev. Sts. *c.* 59, § 29. Whether the assessment of gross damages, and the payment of the same by the mill owner, would create such an incumbrance, it is not necessary to decide. No provision for the assessment of gross damages existed till 1830,

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(*St.* 1829, *c.* 122,) after the mill in question was erected. It is manifest that, under the existing laws, Rev. Sts. *c.* 116, §§ 19–22, no such case can exist, until a complaint has been made in due form of law, and tried, and the jury have assessed a sum in gross, which would be a reasonable compensation for all damages to be occasioned by the use of such dam; the complainant must, within three months, have elected to take such gross sum, and have entered such election on the record; and the mill owner, within three months more, must have paid it. Until this is done, the claim, under the statutes, can be for annual damages only.

The ground, upon which the case of *Carter* v. *Seymour*, 2 Met. 520, was decided, was, that nothing then appearing showed that any easement or privilege in favor of the mill owner had been created in or over the estate of Seymour. If there was no service due to the estate of the mill owner, there was none due from the estate of the land owner. If it was subject to no such service, it was under no incumbrance. The case proceeded on the ground that the act of the mill owner was the exercise of a statute right; that the right of Seymour was to demand a sum of money, as owner, for the time being, of the land flowed; that this was a mere personal right, which might be discharged or waived by parol; and that his personal right, both as against the original builder of the mill and his successor, was thus waived. But if the statute gives the right to each successive owner of the land flowed to claim annual damages, then Seymour's grantee has that right. He is barred by nothing which Seymour has done. But it is said that it would be gross injustice, which the law will not warrant, after Seymour encouraged Jones to build the mill, and waived damages for flowing, because the mill would be of benefit to his estate, if Seymour's successor can now claim damage of the mill owner. It may be very unjust for Seymour's grantee to take the estate thus benefitted and to demand any damage. But the true answer is, that the agreement, if it extended to future damages, could not bind the estate, because it was not in writing. An owner of land

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may have granted his neighbor a right of way by parol, and even on a valuable consideration, and the neighbor may have enjoyed it fifteen years; it may be very unjust for the owner, or for his grantee, with knowledge of these facts, to repudiate the grant and cut off the way; yet if he will he may, because *ita lex scripta est.* The grantee of a right, privilege, or easement in land, must secure it in the manner the law provides; otherwise, the law cannot guaranty it to him.

On the other question, whether the plaintiff, having reconveyed the estate to the defendant, in mortgage, with covenants in the same terms and coextensive with the defendant's covenants with him, can maintain this action, before he has redeemed, the court give no opinion. See *Haynes* v. *Stevens*, 11 N. Hamp. 28.

New trial granted.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1845, AT NORTHAMPTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

HIRAM THAYER & another *vs.* ERASTUS SMITH.

When an assignee of an insolvent debtor files a bill in equity, praying that the defendant, to whom such debtor has mortgaged land for the purpose of giving an illegal preference, may be ordered to give up the mortgage, or convey the land to the assignee, but waiving all claim to a discovery from the defendant, or to an answer on oath, and relying wholly on proofs within the plaintiff's own power, the bill shows that the plaintiff has a plain, adequate and complete remedy at law, by a writ of entry, and that the court have no jurisdiction in equity.

THIS was a bill in equity, brought by the assignees of Levi Dickman, an insolvent debtor, in which they averred that said Levi, on the 7th of March 1844, within six months next before the institution of proceedings in insolvency against him, made to the defendant a mortgage of certain real estate in Hatfield, to secure payment to him of a preëxisting debt. The allegations, &c. in the bill sufficiently appear in the opinion of the court. The prayer of the bill was, that inasmuch as the

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plaintiffs had not a complete and adequate remedy at law, the court would order and decree that the defendant should "surrender, deliver up and release said mortgage, or discharge the same, or convey the property therein described, or pay the full value thereof," and that the plaintiffs, as assignees, might have such further relief, in the premises, as to the court might seem meet.

Demurrer to the bill, and joinder.

Forbes, in support of the demurrer.

Huntington, for the plaintiffs.

SHAW, C. J. The plaintiffs, in their bill, set forth that they are the assignees of the estate of Levi Dickman, an insolvent debtor; that all the property of said Dickman, liable for his debts, has been assigned to them; that said Dickman, within six months before the filing of the petition for proceedings against him, having reasonable cause to believe himself insolvent, conveyed real estate to the defendant, in fraud of the insolvent laws, in order to give him an illegal preference; and that the defendant, when accepting said conveyance, had reasonable cause to believe said Dickman insolvent; by means of which proceedings, and by force of the statute, the said estate vested in the plaintiffs. The bill waives all claim for discovery, and dispenses with any answer on oath.

It appears to the court that the plaintiffs set out a complete title to the estate. As they ask no aid from the defendant, by way of discovery, but depend upon proofs within their own power, the same proof, which would support the bill, would sustain a real action.

One reason assigned for proceeding in equity is, that the plaintiffs may have the benefit of a decree requiring the defendant to discharge or convey his interest, in order to clear the title of a cloud. But nothing can more effectually clear the title of all cloud, than the judgment of a court of law, upon the very question of title, in a real action.

We are of opinion that the plaintiffs have a plain, adequate and complete remedy at law, and that the court have no jurisdiction in equity. See *Law* v. *Thorndike*, 20 Pick. 317.

Bill dismissed

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Porter Dickinson *vs.* Waitstill Dickinson.

A vendor of personal property, though he gives a bill of sale thereof, is a competent witness to prove that he had no title thereto; and though he sells with warranty of title, he is a competent witness, for this purpose, when called by a third person, who claims the property and brings an action of trover therefor against the vendee.

A party's admissions of particular facts are receivable in evidence against him, though they were made while he was negotiating for a compromise.

In the trial of an action of trover, evidence was received that the defendant, while negotiating with the plaintiff for a compromise of the suit, admitted that he had sold the property in question, and that the plaintiff had demanded it of him, and that the plaintiff then said to him, "I suppose you would do better by me than you offered yesterday." *Held*, that these admissions of the defendant were properly received, and that though the words spoken by the plaintiff, if they had been unconnected with the other conversation of the parties, would have been inadmissible, yet that they were not, when taken in connexion with that other conversation, so objectionable as to require that the verdict for the plaintiff should be set aside.

In an action of trover for a colt, the plaintiff, at the trial in the court of common pleas, before *Cushing*, J. offered evidence tending to prove that the colt was a foal of his mare, and was placed by him on a farm occupied by Eli and Charles Dickinson, and was constantly kept there until the 7th of August 1843, the day of the alleged conversion by the defendant.

The defendant claimed property in the colt by virtue of a bill of sale thereof, for a valuable consideration, made to him by said Charles Dickinson, and offered evidence tending to prove that, prior to said 7th of August, the plaintiff had sold the colt to said Charles.

The plaintiff, to rebut this evidence, offered said Charles as a witness, who testified that he never bought the colt of the plaintiff, and never was the owner thereof. The defendant objected to the admission of this testimony, on the ground of the incompetency of the witness to contradict the bill of sale executed by him; but the objection was overruled.

The plaintiff also offered W. Billings as a witness, who testified, that on the day of the trial, he and one Cook, who was a witness for the defendant, "tried to get the parties together, in a room in the court house, to settle the case;" and that the parties, with Cook and the witness, went into a room for that

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purpose; and that the plaintiff, while there, said he "liked the colt and should be glad to have it;" and that the defendant said in reply, "I sold the colt about four weeks after I got it:" That the plaintiff said to the defendant, "I demanded the colt, you recollect," and the defendant answered, "yes:" That something more was said about a settlement, and the plaintiff said to the defendant, "I suppose you would do better by me than you offered yesterday;" and that the defendant then said, "I wish that Billings and Cook would leave the room, before I talk further about it;" whereupon the witness and Cook left the room. To this testimony the defendant objected; but the objection was overruled.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the aforesaid rulings.

Ashmun & Dickinson, for the defendant. Charles Dickinson was not a competent witness to impeach the bill of sale executed by him. *Allen* v. *Holkins*, 1 Day, 17. If the plaintiff recovers in this suit, the witness is answerable to him in an action of deceit, or of assumpsit on the warranty which is always implied, unless the contrary appears, that the vendor of personal property is the owner thereof. Long on Sales, (Rand's ed.) 201. Peake on Ev. (2d Amer. ed.) 113. In *Jones* v. *Huggeford*, 3 Met. 519, the court held a vendor to be competent to impeach the title to the property, on the ground that the terms of the sale excluded a warranty; thereby implying that a warrantor is incompetent.

The testimony of Billings, which related to statements made to the defendant while negotiating for a compromise, and for the purpose of buying peace, were inadmissible, especially his testimony as to the offer made by the defendant on the preceding day. 2 Stark. Ev. 38. 3 Dane Ab. 337. Greenl. on Ev. § 192.

Forbes, for the plaintiff. The rule, that a party shall not be received to impeach an instrument that he has signed, is confined to negotiable paper. *Churchill* v. *Suter*, 4 Mass. 159. *Thayer* v. *Crossman*, 1 Met. 416. And if the defendant might maintain an action against Charles Dickinson, on the implied

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warranty of title to the colt, on its being proved that the colt was his, yet this does not render Dickinson incompetent, as he testified against his interest.

Billings testified to distinct facts admitted by the defendant, viz. the defendant's sale of the colt, and the plaintiff's demand on him, and not to offers of compromise. The testimony was therefore admissible, although the parties were together for the purpose of effecting a compromise, when those facts were admitted. *Hartford Bridge Co.* v. *Granger*, 4 Connect. 148. *Marsh* v. *Gold*, 2 Pick. 290. *Gerrish* v. *Sweetser*, 4 Pick. 374. Greenl. on Ev. §§ 192, 197. 2 Stephens Nisi Prius, 1610.

Dewey, J. 1. The objection to the competency of Charles Dickinson as a witness cannot avail the defendant, supposing the sale to have been made by him with warranty; as he was called to testify against his interest, and not to sustain the property in the vendee.

2. Nor can the objection prevail, which is taken to the testimony of this witness, that it is in contradiction to his written bill of sale. It has been sometimes suggested that public policy, if not sound morality, requires that a party should not be allowed by his testimony to control or defeat an instrument to which he has given his signature as a contracting party; but no such general rule of law has been adopted. On the contrary, the cases of exclusion have been limited to parties to negotiable instruments. *Inhabitants of Worcester* v. *Eaton*, and *Loker* v. *Haynes*, 11 Mass. 368, 498. *Hudson* v. *Hulbert*, 15 Pick. 423.

3. A further objection is taken to the competency of certain evidence offered by the plaintiff, and derived from the declarations and admissions of the defendant. The objection relied on is, that these admissions were made pending a treaty between the parties for a compromise of the matter in litigation in the present suit. The rules of evidence exclude, to some extent, and under certain circumstances, the declarations and admissions of a party. Thus, the more fully to protect the rights of parties litigating, all their communications with counsel are held to be privileged. Evidence of this character

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has always been excluded, and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money, or other valuable consideration, with a view to a compromise of the matter in controversy. It must be permitted to men to endeavor to buy their peace, without being prejudiced by a rejection of their offers. Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them. But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise. The more convenient rule might have been that which is applicable to communications between client and attorney, excluding, as testimony, every thing communicated in this relation; which rule, if applied here, would exclude every admission made during the interview which was had for such compromise. To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time "to be made without prejudice." But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact. *Waldridge* v. *Kennison*, 1 Esp. R. 143. And the rule seems now very generally settled, and sanctioned by authority, that evidence of the admission, by a party, of any independent fact, is admissible, though made under treaty of compromise. Greenl. on Ev. § 192. It has been directly so held in this Commonwealth, in the cases of *Marsh* v. *Gold*, 2 Pick. 290, and *Gerrish* v. *Sweetser*, 4 Pick. 374. To these authorities may be added *Fuller* v. *Hampton*, 5 Connect. 416. *Murray* v. *Coster*, 4 Cow. 635. *Sanborn* v. *Neilson*, 4 N. Hamp. 501.

The right now given by the laws of this Commonwealth to any party to draw from his adversary in a suit at law, through the instrumentality of a bill of discovery, an admis-

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sion of all facts known to him, which may be useful to the cause, has rendered this whole matter of much less practical importance; for, if excluded as an admission made pending a compromise, they may be drawn from the party through the medium of a bill of discovery. So far, therefore, as relates to the evidence offered of admissions of particular facts by the defendant, as that he had sold the property in controversy, and that a demand had been made on him for the same, these are clearly admissions and declarations not protected by the rule excluding offers by way of compromise.

In connexion with this evidence, there was admitted a portion of the conversation between the parties, of a more doubtful character, in which the plaintiff said, "I suppose you would do better by me than you offered yesterday." If these words were introduced as evidence disconnected with the other facts stated, they would be properly excluded; certainly, if it was proposed to have the jury infer from them that the defendant had made to the plaintiff an offer to adjust their controversy, by payment to him of money, or other valuable consideration. But, although irrelevant, we do not think they were, under the circumstances, so far objectionable as to require the verdict to be set aside for this cause. They were introduced in connexion with other words proper to be admitted as evidence. So also, when closely examined, they will not be found to contain any admission that the defendant had ever offered to pay the plaintiff any thing. They would be entirely consistent with a mere offer by the defendant to adjust the matter upon the plaintiff's withdrawing his suit. They are, perhaps, also, to be taken as the words of the plaintiff, and without being assented to by the defendant. We do not deem them of such a character, or so material, as to justify or require us to order a new trial.

Exceptions overruled.

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Oliver Cowls *vs.* Rufus Hastings.

Under the Rev. Sts. c. 73, § 23, which require an officer, in the return of his doings in the levy of an execution on land, to set forth the time when the premises were taken on execution, his return is sufficient, if it state the day of the taking, without mention of the hour and minute; and it is also sufficient, if it set forth acts which constitute a taking, without expressly averring it.

An officer, under date of September 25th, made a return on an execution, stating that he, pursuant to said execution, had caused three discreet and disinterested freeholders of the county to be sworn, as appeared in the magistrate's certificate, and that they afterwards viewed the land described in their certificate of appraisement, and that he extended the execution on said land, and delivered seizin and possession thereof to the execution creditor: He also made the certificates of the magistrate and of the appraisers a part of his return: The certificate of the magistrate was, that the appraisers were sworn before him on the 16th of October: The certificate of the appraisers was dated September 25th, and stated that they, having been first sworn, viewed the land and appraised it. *Held*, that it sufficiently appeared from the return, 1st, that the appraisers were sworn before they viewed and appraised the land, and 2d, that the officer took the land, on the execution, on the 25th of September; and that the levy was valid.

This was a writ of *scire facias*, requiring the defendant to show cause why an alias execution should not be issued on a judgment recovered against him by the plaintiff, pursuant to the Rev. Sts. *c.* 73, § 21, on the ground that the land, on which the original execution was levied, could not be held by the plaintiff. The case was submitted to the court on the statement of facts which follows:

At the court of common pleas, held at Northampton in August 1843, the plaintiff recovered judgment against the defendant for the sum of $741·72 damage, and $10·51 costs. Execution issued on this judgment, on the 4th of September 1843, and was delivered to Ivers Phillips, a deputy of the sheriff of Worcester, who returned it with the following certificates, &c. indorsed thereon:

"Worcester ss. September 25th 1843. Then personally appeared before me the subscriber, one of the justices of the peace within and for said county of Worcester, Alpheus Merrifield, and made solemn oath that he would faithfully and impartially appraise such real estate as should be shown to him to satisfy this execution and all costs. Thomas Kinnicutt, Justice of the Peace.

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"Worcester ss. October 16th 1843. Then personally appeared before me the subscriber, one of the justices of the peace within and for said county of Worcester, Hezekiah Gibbs and James Pitts, and made solemn oath that they would faithfully and impartially appraise such real estate as should be shown to them to satisfy this execution and all costs. Wm. H. Moore, Justice of the Peace.

"We, the subscribers, inhabitants of the county of Worcester, being chosen to appraise such real estate as should be shown to us as the property of the within named Rufus Hastings, the debtor, to satisfy this execution, having been first sworn, have viewed the following described premises, which we have appraised at five hundred and ten dollars and eighty five cents, which we have set out, by metes and bounds, to the said Oliver Cowls, the creditor, to hold to him, his heirs and assigns forever, as follows, viz. (describing the premises by metes and bounds.) Alpheus Merrifield. Hezekiah Gibbs. James Pitts.

"Worcester ss. September 25th 1843. Pursuant to the within execution, I have caused three disinterested and discreet persons, freeholders of said county, to be sworn as above, viz. Alpheus Merrifield, chosen by the within named Cowls, the creditor, Hezekiah Gibbs, chosen by the within named Hastings, the debtor, and James Pitts, chosen by myself, who afterwards viewed the above described premises, which were shown them, by the said creditor, as the estate of the within named debtor, and I have extended this execution on said described land by said appraisers appraised at five hundred and ten dollars and eighty five cents, which is in part satisfaction of this execution, and I have delivered seizin and possession of the same, with the appurtenances thereof, to the said creditor, by metes and bounds, as by the certificate of the justices and appraisers above written, and which are to be taken as parts of this return. To have and to hold the same to the said Oliver Cowls, and his heirs and assigns forever, in part satisfaction of this execution, as by the receipt of his attorney hereon. From said last mentioned sum I have deducted

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seventeen dollars and fifty cents for my fees and the charges of levy, and have applied four hundred and ninety three dollars and thirty five cents in part satisfaction of the debt and costs of this execution, and return the same unsatisfied for the balance. Fees and charges: Levy, $9·10. Travel, $0·60. Paid appraisers, $5·40. Surveyor, $1. Recording execution, $1. Paid justices, $0·40—$17·50. Ivers Phillips, D. Sheriff.

"Worcester ss. September 25th, 1843. Received of Ivers Phillips, a deputy sheriff of the county of Worcester, seizin and possession of the above described real estate, in part satisfaction of this execution. Oliver Cowls,

"By his attorney, Thomas Kinnicutt."

Said execution and the foregoing return and certificates were recorded in the registry of deeds for the county of Worcester, on the 14th of November 1843.

Alias execution to issue, if the levy aforesaid is void, and if the plaintiff is entitled to an alias; otherwise, judgment to be rendered for the defendant for costs.

Delano, for the plaintiff.

Forbes, for the defendant.

Dewey, J. Two objections are taken to the validity of the levy in question. 1st. That it does not appear that the appraisers were duly sworn before entering upon the discharge of their duty. This objection arises from certain apparent discrepancies in the time of administering the oath, as indicated in the accompanying certificates of the various proceedings connected with the levy, and returned with the doings of the officer making the levy. Taking the return of the officer and that of the appraisers merely, all seems to correspond, and no conflict arises. The only difficulty that would then exist would be the want of the particular averment that the oath was administered by a justice of the peace; which was held requisite, in *Chamberlain* v. *Doty*, 18 Pick. 495. It becomes necessary, therefore, to refer to the certificates of the magistrates, as to the proper oath being taken by the appraisers; and they are distinctly referred to by the officer, and adopted and recognized as part of the return of the levy

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Hence arises the difficulty; the certificate of one magistrate stating the oath to have been administered to two of the appraisers on the 16th of October 1843, a time later than the apparent time of making the levy and appraisement, which purport to have taken place September 25th 1843.

We think two answers may be given to this objection as to the time of administering the oath to the appraisers; or rather, two modes suggest themselves of viewing this apparent difficulty; either of which sufficiently answers the objection relied on. *First.* If there be this apparent discrepancy in dates —the certificates of the officer and the appraisers differing from that of the magistrate—the two former, being more especially certificates required by law than that of the magistrate, must control. We are aware that it is said the officer has adopted the certificate of the magistrate, and has therefore vouched for its entire accuracy, as well as to the date as the fact of the administration of the oath. But we think this is not so. Such would have been the result, if the certificate of the officer had been silent as to the time of administering the oath, and did not conflict with that of the magistrate. But his entire certificate is to have effect; and if his adoption of the certificate of the magistrate is accompanied with qualifying or negative allegations, the officer's return is to be taken with those qualifications. Now, the officer most clearly states that the appraisers, having been sworn, "afterwards viewed the premises," &c. The certificate of the appraisers is still more direct and explicit as to the fact that they were sworn before proceeding to make their appraisement. They say, "we the subscribers, having been first sworn, have viewed the following described premises, which we have appraised," &c. These certificates, if true, show most clearly that the oath was administered before the appraisement, be that when it may. If the appraisement was on or before the 25th of September 1843, then the time of administering the oath is erroneously stated by the magistrate. If it be necessary to reject either of the dates, we may reject that of the magistrate of 16th October; and such rejection would seem to be well

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authorized by the case of *Shove* v. *Dow*, 13 Mass. 534. And in this mode we think the objection taken may be obviated, and the levy held good.

Secondly. Another view that may also be taken is, that the levy may be considered as taking effect from the time of the original seizure or taking of the land on the execution, and so the officer might, in carrying out this principle, date his entire proceedings as of the day of the commencement of the levy, although the further proceedings, in the completion of the levy, might take place at a day subsequent to the seizure. Rev. Sts. *c.* 73, § 22. *Hall* v. *Hoxie*, 3 Met. 253. This view of the question would give full force and effect to all the certificates and returns appertaining to this levy, and avoid all objections arising from discrepancy of dates. Suppose the levy to have been commenced on the 25th of September by making the seizure at that date, but the appraisement not made until the 16th of October; the oath might then properly have been administered on the 16th of October; the appraisers would then be duly qualified to act; they might, subsequently to that day, have made their appraisement; and the levy be thus completed in regular, successive order of events, although the form of the certificate of the officer, standing alone, might indicate that the proceedings took place at an earlier date. With the statute provision, that the levy shall be considered as made at the time when the and is taken, it would seem reasonable to give the officer's certificate the construction, that it had reference to the commencement of the proceedings, and not the consummation of the levy; especially where the dates of the subsequent proceedings are stated in the certificate of the magistrate or appraisers, and such construction is consistent with entire verity in the different certificates, and renders them all harmonious.

The court are therefore of opinion, that this levy is not invalid by reason of any defect in the matter of the due administration of the oath to the appraisers.

2d. It is further objected to the validity of this levy, that the return by the officer does not set forth the time when the

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premises were taken on the execution. As to the suggestion that the precise point of time, even to the designation of the hour of the day when the land is taken, must be stated in the return, in order to render the levy valid, we perceive no statute provision requiring it. Under the general enactment requiring the officer to state the time when the premises were taken on the execution, we understand that the day, and not the particular hour and minute, is to be stated. A different provision will be found in the registry law, Rev. Sts. *c.* 59, § 24, requiring the register to note "the day, hour and minute of reception" of each deed.

The more serious objection under this second head, and one more strongly urged, is, that there is an entire omission to set forth the day on which the premises were taken on the execution. This is required by the statute, (Rev. Sts. *c.* 73, § 23,) and unless it is substantially complied with, the return is defective. It is conceded by the defendant's counsel, that this is not directly stated in the words of the statute requisition; but it is said to be necessarily implied in the statement contained in the return of the officer. He has returned that on 25th of September 1843, he "extended this execution on said described land." This certificate of the time of extending the execution is a good certificate to show that the premises were taken on execution on the 25th of September 1843. See *Childs* v. *Barrows*, (*ante*, 413.) It certainly imports a taking on execution, at a date as early as that. An extending of an execution on real estate necessarily includes a taking of the premises on execution, and it fixes the time of the taking at the same period with the completing of the extent, when no further recital is found in the return. We do not mean to suggest that a return of a levy, technically and carefully drawn, should not set forth distinctly the time of the original taking; and especially if such taking on execution be the original lien by way of seizure, and the object be to secure a priority as regards other creditors.

The argument of the plaintiff has pressed upon our consideration various supposed cases of conflicting rights arising

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under different levies, and the necessity that would arise, in such cases, of direct averments, in the return, of the time of the taking on execution, with a view of settling questions of priority among the various creditors who might make levies. It is sufficient to say, that no such conflict arises here. No other levy was made upon the premises, prior to the time when the officer certifies that he extended the execution of the plaintiff. The result to which we have come on this point is, that the certificate of the officer, stating the execution to have been extended on the 25th of September 1843, is a good averment of the taking of the premises in execution on that day, and that the omission to set forth more particularly, in a distinct recital, the time of the original taking does not vitiate the levy; but that the same is good as a levy made on the 25th of September. As such, it avails the plaintiff and vests in him a good title to the land levied on; and he has therefore sustained no injury through any defect in the return.

Judgment for the defendant for costs.

EBENEZER WILLIAMS *vs.* TIMOTHY J. GRIDLEY.

In a suit by the payee against the maker of a promissory note, if the defendant relies on the statute of limitations, and the plaintiff relies on a payment by the defendant within six years, the plaintiff may introduce parol evidence of a receipt given by him to the defendant for money paid on the note, although it appears that the defendant returned the receipt to him upon his indorsing the amount thereof upon the note.

An oral admission by a defendant that he has made a payment on the demand in suit, within six years next before the suit was commenced, is competent evidence to take the case out of the statute of limitations — Rev. Sts. c. 120, § 17.

THIS was an action of assumpsit, commenced August 5th 1844, on a promissory note for $176, signed by the plaintiff, dated June 13th 1836, and payable to the plaintiff in one year, with interest.

At the trial in the court of common pleas, before *Cushing*, J the defendant relied on the statute of limitations. The note,

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when offered in evidence, had an indorsement, in the plaintiff's hand writing, dated April 15th 1842, of the sum of thirty eight dollars received in part payment. The plaintiff offered, as a witness, the attorney with whom the note was left for collection, to prove that payment had been made on the note, by the defendant, according to the indorsement. This witness testified that the note was left with him before June 1842, and soon afterwards went back into the hands of the plaintiff; that on or before the 17th of June 1842, and while the note was in the plaintiff's hands, the defendant brought to the witness a receipt, signed by the plaintiff, for a sum of money, (the amount of which the witness did not recollect,) and requested that the amount should be indorsed on the note; stating that he had made a payment to the plaintiff on the note; that the witness refused to make the indorsement, stating to the defendant, as a reason for his refusal, that he had not received the money himself, but promising him that the indorsement should be made as soon as the witness could see the plaintiff; that the defendant left the receipt with the witness, who, when he first saw the plaintiff afterwards, caused the indorsement to be made by the plaintiff.

The defendant objected to the evidence thus offered, 1st, because the receipt was not produced; and 2d, because it was not competent evidence to prove part payment. But the objection was overruled.

Another witness testified, that a few days before this action was commenced, he called on the defendant and requested him to pay the note; that the defendant said he had made a payment on it a short time before, and inquired whether this payment was indorsed.

The defendant objected to this evidence also, as incompetent to prove part payment. The judge overruled the objection, and instructed the jury, that if they believed, upon this evidence, that the defendant had made a payment on account of the note, within six years before action brought, the statute bar was removed, and the defendant liable. A verdict was returned for the plaintiff, and the defendant alleged exceptions to the said rulings and instructions.

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Delano, for the defendant. Evidence of the receipt should not have been admitted; but the receipt should have been produced. *Van Deusen* v. *Frink*, 15 Pick. 449. Greenl. on Ev. § 84. Roscoe on Ev. 1–4.

By the Rev. Sts. *c.* 120, § 13, no acknowledgment or promise shall be evidence of a new or continuing contract, to take a case out of the operation of the statute of limitations, or to deprive a party of the benefit thereof, unless such acknowledgment or promise be made in writing, &c. If by § 17 part payment is excepted from the provision in § 13, yet the exception will not extend to a case where there is no witness of the payment. This seems clear from the policy and the language of *c.* 120, and from the English decisions on a similar statute. The policy of that chapter is, to favor defendants, and, by requiring written acknowledgments and promises, to remedy the evil that had arisen from distinctions and refinements, as to the proof and effect of oral acknowledgments and promises. See 3 Bing. 331, per Best, C. J.; 3 Younge & Jerv 522, per Garrow, B.; and the preamble to *St.* 9 Geo. 4, *c.* 14. The case of payment, in § 17, is within the evil provided against in § 13.

Under *St.* 9 Geo. 4, *c.* 14, the English courts have decided that verbal acknowledgments of payment are not sufficient to take a case out of the statute, but that there must be a written acknowledgment of payment. *Willis* v. *Newham*, 3 Younge & Jerv. 518. Wilkinson on Lim. 86. *Waters* v. *Tompkins*, 2 Crompt. Mees. & Rosc. 723, and Tyrw. & Grang. 137. *Bayley* v *Ashton*, 12 Adolph. & Ellis, 493. *Maghee* v. *O'Neil*, 7 Mees. & Welsb. 531. *Eastwood* v. *Saville*, 9 Mees. & Welsb. 615. *Bevan* v. *Gething*, 3 Adolph. & Ellis N. R. 740. Joynes on Lim. 287–295.

Dickinson, for the plaintiff. The evidence of the receipt was rightly received; it being no part of the contract in question, and there being no legal presumption that it was in the plaintiff's hands. *Southwick* v. *Hayden*, 7 Cow. 334. Greenl. on Ev. § 90. 1 Stark. Ev. 393.

It appears from several of the English decisions cited for

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the defendant, that the judges are dissatisfied with the decision made in *Willis* v. *Newham*. And as the Rev. Sts. *c.* 120, § 17, do not prescribe the evidence that shall be given of payment, the common law evidence is to be admitted. Several decisions of this court seem to proceed on this ground. *Ilsley* v. *Jewett*, 2 Met. 168. *Penniman* v. *Rotch*, 3 Met. 220. *Sigourney* v. *Wetherell*, 6 Met. 553.

Dewey, J. To avoid the effect of the statute of limitations, the plaintiff relies upon the evidence tending to show a payment, by the defendant, of a part of the demand, within six years next before the commencement of this action. The evidence offered is oral testimony of the admissions of the defendant to that effect. To the admission of such evidence, it is objected *first*, that it appears from the facts stated by the witness, upon this point, that there has been in existence a receipt in writing, under the hand of the plaintiff, acknowledging the payment of this money, and that this is the better evidence. But this ground is quite untenable. For if it be assumed that this receipt, which, at the time it was shown to the witness, was in the hands of the defendant, was subsequently delivered to the plaintiff, upon his indorsing the payment on the note itself, yet the instrument is not of a character to raise any presumption that the same was kept by the plaintiff or is now in his possession. It was intended as a memorandum of a payment, to be kept until such payment was actually indorsed; but when that indorsement was made, the paper ceased to be of any value; and if delivered to the plaintiff, no inference results that he would keep it. And we are not warranted in assuming that the plaintiff has it now in his possession.

The *second* objection is one of more importance, from its bearing upon the construction to be given to Rev. Sts. *c.* 120, §§ 13–17. By § 13, "no acknowledgment or promise shall be evidence of any new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or

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in some writing, signed by the party chargeable thereby." It is quite obvious that this enactment has introduced a material change in the effect to be given to the statute of limitation of personal actions. It has prospectively legislated out of the judicial forum those numerous and somewhat perplexing cases of alleged new promises, either express or implied, sustained by oral admissions and statements by the party sought to be charged. Thus far the statute is plain as to the construction to be given to it. The question arises upon the further provision contained in § 17: "Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of the payment of any principal or interest, made by any person." It is contended by the defendant that upon the proper construction of this statute, 1st, evidence of such payment can be shown only by some written acknowledgment under the hand of the party to be charged; or 2d, if this be not so, that there must be at least direct evidence of payment, derived from the testimony of witnesses thereto, and that the mere oral admissions of the party are wholly incompetent to establish the fact of such payment.

As to the first of these positions, the defendant fails in sustaining it, either by any direct language of the statute itself, or any adjudicated cases favoring this construction.

The second ground relied upon requires more consideration. It is supposed, by the counsel for the defendant, to be strongly supported by the English decisions upon *St.* 9 Geo. 4, *c.* 14, which is similar in its character to that of our own. Of these cases, the leading decision is that of *Willis* v. *Newham*, 3 Younge & Jerv. 518, in the court of exchequer, where it was held that a verbal acknowledgment of the payment of a part of a debt, within six years, is not sufficient, within the provisions of *St.* 9 Geo. 4, to take the case out of the operation of the statute of limitations. The course of argument relied upon in that decision was, that as the statute had provided that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, to take the case out of the statute of limitations, unless such

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acknowledgment or promise be made or contained by or in some writing signed by the party, it could not have been contemplated that the same species of evidence which was rejected by the statute, as too uncertain, loose and unworthy of confidence, to prove an acknowledgment or new promise, should be competent evidence to effect the same object under the form of evidence offered to prove a payment of a part of the principal within six years. It is virtually contended that the previous general enactment, requiring the evidence to be in writing, to create a new promise, is to be ingrafted upon the further provision as to partial payment; that the latter case is equally within the mischief, and should therefore fall within the same restriction.

The defendant also relies upon the cases of *Bayley* v. *Ashton*, 12 Adolph. & Ellis, 493, and *Waters* v. *Tompkins*, 2 Crompt. Mees. & Rosc. 723, and Tyrw. & Grang. 137. But in the former of these cases, Lord Denman admitted that, if he were then for the first time called upon for a construction of this act, he should be of opinion that any proof of payment was sufficient. And in the latter of these cases, there was a relaxation of the rule, inasmuch as the court admitted verbal declarations of the party, as to the appropriation of a payment; thus indirectly taking a case out of the operation of the statute, by oral evidence of the admissions of the party.

In *Maghee* v. *O'Neil*, 7 Mees. & Welsb. 531, while the court sustained the decision in *Willis* v. *Newham*, Lord Abinger, C. B. said, "if this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by Lord Tenterden's act to be proved as at common law. My impression is, that the act has been pressed beyond its intention." Parke, B. also said that his feeling was, that the decisions had gone too far. It is quite obvious that the courts have conformed to the decision in *Willis* v. *Newham*, only because they were not sitting as a court of the last resort, and did not feel authorized to overrule that decision. In *Eastwood* v. *Saville*, 9 Mees. & Welsb. 615, where the court again sanctioned the ruling in *Willis* v. *Newham*, it was declared to

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be because they were bound by the previous decisions, until the cases were overruled by the highest court.

This brief review of the adjudicated cases clearly shows that they are not of a character that should control our decision. The English courts have again and again expressed their doubts as to the correctness of the decision in *Willis* v. *Newham*, and their indisposition to sanction it. It surely becomes us, therefore, to pause before giving our sanction to the doctrine of that case, and to pause at the threshold, and before we have embarrassed ourselves by any unfortunate precedent of our own. The question is with us an open one, to be decided solely upon principle and sound reason. Looking at § 17 of *c.* 120 of the Rev. Sts., we are to inquire what are the purport and meaning of the provision that full effect shall be given to the payment of any principal or interest, in taking a case out of the statute of limitations. Is it not payment proved by any evidence competent, under the rules of the common law, to establish such fact? If it be so — and we think this is the reasonable import of the provision — then it will follow that payment of a part of the demand may be shown by the verbal admission of the party, and that it is competent for the plaintiff to offer such admission in evidence, to avoid the effect of six years having elapsed since the cause of action accrued. The court are clearly of opinion that there is no restriction in the statute, excluding proof of payment by the verbal admission of the party to be charged; that it is competent evidence; and that its sufficiency is to be left to the jury, as in other cases.

Exceptions overruled

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Wells Lathrop *vs.* President, Directors, &c. of Amherst Bank.

An agreement between A. and B., that B. shall prosecute and manage A.'s suit at law, as A.'s agent, and that he shall receive, for his services, a certain per cent. on the amount that shall be recovered, and that, if he does not recover, A. shall pay him no more than his actual expenses, amounts to champerty, and is so far illegal and void, that B after obtaining judgment for A, cannot maintain an action on the agreement.

Assumpsit to recover $500 for services rendered to the defendants, in the management and settlement of suits brought by them against Luther Root and others.

The parties submitted the case to the court on the following facts agreed: At a meeting of the stockholders of the Amherst Bank, held October 3d 1842, it was voted, that an agent be appointed to prosecute all claims or suits of the bank against any person or persons liable thereto; and by ballot Wells Lathrop was chosen as agent for the bank for the prosecution of all suits in favor of the bank. It was also voted, that Wells Lathrop, in connexion with the directors, be authorized to make any compromise of any claim on the part of the bank against any person or persons, which they may deem for the interest of the bank to make.

At a meeting of the directors of the Amherst Bank, held January 11th 1843, the following vote was passed: "Wells Lathrop being appointed agent, by the stockholders of the Amherst Bank, at a meeting held October 3d 1842, and the condition of his acceptance of the appointment having been made known to the directors; therefore voted, that we accept the terms proposed, and allow Wells Lathrop five per cent. on the amount, in case he recovers in the suits now pending in favor of the bank, and in case he does not recover, the bank are to pay him no more than his actual expenses, without allowing him any thing for his time." This vote was communicated to the plaintiff, soon after it was passed, and he thereupon accepted the agency, and proceeded to the management of the said suits, and the preparation of them for trial, and

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continued the management of them, until judgment was recovered in them, at the April term of the supreme judicial court in 1843, for the sum of $10,000.

R. A. Chapman & Ashmun, for the plaintiff.

Forbes & Dickinson, for the defendants.

The decision was made at September term 1846.

DEWEY, J. The contract upon which the plaintiff seeks to recover was illegal, being in violation of the principles of law in reference to maintenance and champerty. Such agreement for a proportionate share in the fruits of litigation, as a consideration for services rendered in conducting and prosecuting, with success, a suit at law, where the party has no interest, legal or equitable, and no claim or expectancy, even remotely contingent, has been deemed contrary to public policy, and proscribed by statutes and the common law. The *Sts.* 3 and 13 Edw. 1 related to officers of the king; but the provisions were further extended, and made applicable to other persons, by *St.* 28 Edw. I. 2 Inst. 207, 563. Independently of these statutes, such agreements seem also to have been considered as illegal at common law.

It is, however, contended, on the part of the plaintiff, that the evils originally attending such contracts, and the undue influence supposed to result from them, in the prosecution of litigated claims, no longer have any real practical influence, and that, in view of this change, and in the absence of any statute of this Commonwealth forbidding such contracts, we ought now to introduce a more liberal system in reference to contracts like that now under consideration.

No doubt is entertained but that the earlier doctrine as to maintenance has been very essentially modified. Its application to many cases entirely venial in their character, and not within the mischief to be guarded against in the administration of justice, has been denied and abandoned. Hence the many cases that have occurred, and are continually occurring, which form exceptions to the general rule that declares maintenance and champerty illegal; cases of remote and contingent interests, or possibility of interest in the subject litigated;

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cases of affinity in the persons intermeddling or aiding in conducting the suit; or other equally justifying causes. But while the exceptions to the rule have been thus multiplied, and have come to be liberally considered and allowed, the rule itself has not been abrogated, but, on the contrary, has become the subject of statute enactment in some of our sister States, and, where no statute exists, is recognized as a part of the common law applicable to such contracts.

It is not, however, our purpose to consider this question as one of novel impression, or pronounce an opinion upon the point whether, in the present state of society, more good or evil may result from giving effect to a defence of this nature. The question before us is merely, what is the law of this Commonwealth in reference to it. And as to that, we think there can be no reasonable doubt. It has become a well settled principle in our system of jurisprudence; so much so, that we should not feel at liberty to abrogate it by force of a judicial opinion merely. The point now in issue arose distinctly in the case of *Thurston* v. *Percival*, 1 Pick. 415. The facts were substantially the same, and all those considerations, which have now been pressed upon us as reasons for repudiating the illegality of such contracts, were equally applicable in that case. This court, after a full argument, and upon mature consideration, decided against the validity of the contract. Although more than twenty years have elapsed since that decision was promulgated, and during the intervening period a general revision of the statutes of the Commonwealth has taken place, in which many adjudications of this court were brought under legislative revision, and many new enactments were made, modifying such decisions as were thought to be inapplicable to the present state of the Commonwealth, no new statute or legislative provision was made upon this subject. For these reasons, we do not feel authorized to consider the ground of defence here relied upon as one novel in principle, but we must regard it as the application of a well settled rule of law.

It was suggested in the argument that the facts here shown

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do not bring the case strictly within the definition of champerty, as the plaintiff was not to conduct the suit wholly at his own expense, but was, in the event of a failure to sustain the action, to be remunerated for his actual expenses. It is true that some of the elementary books, in defining champerty, say that "the champertor is to carry on the suit at his own expense;" as 4 Bl. Com. 135; Chit. Con. (5th Amer. ed.) 675. Other books of equal authority omit this part of the definition of champerty; as 1 Hawk. *c.* 84, § 1; Co. Lit. 368 *b.*

Maintenance and champerty, if we are to judge from the manner in which they are usually introduced in connexion with this subject, are deemed illegal, not from the consideration that all the expenses of the litigation are to be borne by a stranger, but in reference to the evils resulting from officious intermeddling, and upholding another's litigation by personal services as well as money; more dangerous formerly than now, as more powerful combinations were resorted to with a view of controlling, if not overawing, the judicial tribunals. In the view we have taken of the subject, the result is, that the defence is well maintained.

Royal Smith *vs.* Inhabitants of Colerain.

The provision in the Rev. Sts. *c.* 46, § 18, that "every town shall be held to pay any expense which shall be necessarily incurred, for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of the said town, and until provision shall be made by them," applies only to expense incurred in the support of a pauper found or residing in the town.

A. agreed with the town of C. to support two of its paupers, for one year, for a certain sum, and removed them into an adjoining town, where they were supported, during the year, at his charge, in the family of their son in law: At the end of the year, the town agreed with B. to support its paupers, for a year, for a certain sum: The said two paupers afterwards remained in the adjoining town, in the family of their son in law, who was requested by A. to support them, at his charge, until they should be removed to the town of C.: A. also gave notice to the overseers of the town of C. that said paupers were on his hands, and requested the overseers to provide for them: No provision was made for said paupers by the overseers, and they were supported by their son in law, at A.'s charge. *Held*, that the town of C. was not bound to pay to A the expense incurred by him, after the first year, for the relief of these paupers.

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Assumpsit on the Rev. Sts. c. 46, § 18, to recover the expense necessarily incurred by the plaintiff for the relief of Eliab Washburn and his wife, paupers, for eighteen months, viz. from April 8th 1841 till the commencement of this action, after notice and request made to the overseers of the poor of the town of Colerain to provide for them.

At the trial in the court of common pleas, before *Cushing*, J. it appeared that said Washburn and wife received assistance, as paupers, from the defendants in 1838, and were ever after poor and in need of assistance; that in 1839, their support for that year was set up at auction, by a vote of the town, and bid off by Daniel Donelson; that in April 1840, their support was set up at auction, by a vote of the town, and bid off by the plaintiff at three dollars a week; and that the town then voted that the plaintiff "should have them to support that year."

It further appeared that the plaintiff, in April 1840, contracted with John Eddy of Guilford in Vermont, son in law of said Washburn, to support said Washburn and wife, for one year, and that said Eddy supported them accordingly, at his house in said Guilford, a town adjoining Colerain, and that the plaintiff was paid by the defendants for said support, at the rate of three dollars a week; that the plaintiff, in April 1841, told said Eddy to keep said Washburn and wife till they should be called for, and he would pay the charges; that said Eddy did support them at said Guilford until the commencement of this action, at the plaintiff's charge, and that they had never been in Colerain since April 1840.

It further appeared that, at the April town meeting in 1841, it was voted "that the support of the paupers over twelve years of age be set up singly; that Washburn and wife be left to the overseers to provide for:" That the town then voted to set up all the paupers together, except the children, "the contractor to be at no expense for paupers out of town, until removed into town, except Washburn and wife:" That the support of the paupers was then bid off by Walter Bell, jr. at $500; and that the town then voted "that Walter Bell, jr. have the paupers, collectively, to support for the year ensuing."

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It further appeared that the plaintiff, early in April 1841, gave notice to the overseers of the poor of the town of Colerain that Washburn and wife were on his hands, and at expense, and that he wished the overseers to provide for them; that the overseers thereupon told the plaintiff that they had nothing to do about the matter; that the town had acted for itself, and disposed of the paupers, in open town meeting, to Walter Bell, jr.; and they referred the plaintiff to said Bell.

The judge instructed the jury (among many other things not here drawn into question) "that if they should be satisfied that these paupers had been supported by the town of Colerain sometime previously to the 8th of April 1841, they being, at the same time, at Guilford, in the State of Vermont, with the knowledge and consent of the overseers of the poor of the town of Colerain, these paupers might be considered as constructively, if not actually, in the town of Colerain; and that it was the duty of the overseers of the poor of Colerain, on being notified by the plaintiff of the condition of these paupers, and being requested by him to furnish relief, then to afford such relief."

A verdict was found for the plaintiff, and the defendants alleged exceptions.

Davis, for the defendants.

Grennell, for the plaintiff.

Shaw, C. J. This action is brought by an individual against the inhabitants of Colerain, to recover money alleged to have been expended by him, in support of two poor persons, whom the defendants were bound to support. The action, if it can be maintained at all, must be maintained, either on the ground of contract, or of statute liability. The evidence, as it seems to us, is so far from establishing any contract, that it proves the contrary. There was no express undertaking to pay the plaintiff; and whether a contract could be implied, depends upon the statute liability. Although many questions arise upon the pauper laws, the principles upon which they are founded are few and simple; and it is important, in a system of such deep interest to the community, and of such

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practical importance, that they should be so. It has been too often decided to be now questioned, that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation. By this we understand, not that there is no moral obligation on all men in society to contribute to the support of the poor; but that towns are corporations, for limited and well defined purposes, and that the duty of supporting the poor is not more binding upon them than upon parishes, counties, the State, or other organized bodies, further than such duty is created by law.

1. Towns are by law liable for the relief and support of poor persons, lawfully settled therein, whenever they shall stand in need thereof. Rev. Sts. *c.* 46, § 1. 2. They shall provide for the immediate comfort and relief of all persons, residing or found therein, not belonging thereto, but having a lawful settlement in other towns. § 13. 3. They shall relieve all poor persons, residing or found therein, having no lawful settlements within the State. § 16. 4. Towns are also held to pay any expense which shall be necessarily incurred for the relief of a pauper, by any person not liable by law for his support, after notice and request made to the overseers, and until provision shall be made by them. § 18.

The first great object of the law, founded on the principle of simple humanity, is, that the party standing in need shall have relief immediately, and at the place where it is required; that is, from the overseers of the town where he is residing, or is found, without regard to their ultimate liability. The person in distress shall not be compelled to wait till notice can be given to a distant town, and whilst, perhaps, a controversy is subsisting as to its liability. And to ensure such relief, if the overseers neglect or refuse, on notice, to afford it, any person not himself liable for such relief, may afford it, at the expense of the town.

The second great object of the law is, to provide how this charge shall be ultimately borne. In certain cases, it is chargeable to certain lineal kindred, which we need not stop to con

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sider here; but supposing there are none such, how does the law establish it? In the first of the above cases, the charge is to be ultimately borne, where it first falls, by the town of the pauper's settlement. In the second case, the town furnishing the relief and support are in effect the almoners of the town of the pauper's settlement, who, on notice, are required to reimburse the sums thus paid, and, on refusal, may be compelled to do so by action. In the third case, they are in like manner the almoners of the State, who undertake, in a mode provided by law, to reimburse them. The fourth case above stated, founded on Rev. Sts. *c.* 46, § 18, is that where the overseers of the town in which the pauper is found or resides, whether it be the place of his legal settlement or not, neglect or refuse, on notice and request, to afford relief. The party in whose charge, or under whose care, the poor person is, shall not be compelled to turn him forth without relief, nor to bear, himself, a burden which the town ought and is by law required to bear. In this respect, it makes no difference whether the pauper has his settlement in such town or not. The duty of affording immediate relief to the pauper, and of relieving the person who on considerations of humanity is affording it, is equally imperative in both cases. The only difference is, that in the one case, the town has no remedy over, but simply takes a burden which it is ultimately to bear; in the other case, they have a remedy over against another town, or against the State. Such, we think, is the construction of this statute. The words of the statute, it is true, are general, viz. "every town shall be held to pay any expense which shall be *necessarily incurred*, for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of the said town, and until provision shall be made by them." But the term "every town" must necessarily have some limitation; and we think it quite clear that it is limited to the town in consequence of whose default the person entitled to the remedy is subjected to a duty and burden from which the officers of such town ought to have relieved him by making provision; that is, the

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town where the relief is required, and where it is to be afforded; the town where the poor person is found or is residing.

From this view of the law, it appears to us that, in a suit by an individual against a town for reimbursement of the expense of relieving and supporting a poor person, it must appear that such town was liable for such relief, and that, on due notice and request, made to the overseers, they refused or neglected to afford it. The court, therefore, cannot concur with the learned judge who presided at the trial, in all the opinions expressed by him, as they appear in the bill of exceptions. Without remarking upon all these propositions in detail, we think that it was incumbent upon the plaintiff, in order to maintain his action, to prove that Washburn and wife were residing or found in Colerain; because, in no other event was the town liable, for their support, to the person temporarily furnishing such support. Smith was paid for keeping the paupers, for 1840, the sum to which he was entitled by contract. At the expiration of that time, they were in the family of their son in law, at Guilford, in Vermont. If the laws of Vermont are like ours, in this respect, the town of Guilford would have been liable, after notice and request, either because they had a settlement there, or as a town in which they were residing or found when standing in need of relief. But the town of Colerain were no longer liable; not by contract, for that was performed; not by statute, for the case contemplated by the statute did not exist. If it be suggested that the town might be liable on their contract, for not sending for and taking back the paupers at the end of the stipulated time, it is a sufficient answer that no such contract is declared on or proved.

And we are inclined to the opinion, that it would have made no difference, had the plaintiff proved that the paupers had their settlement in Colerain. If every individual, in any part of the State or out of it, after notice given to a distant town, could afford support to a poor person, and bring an action directly against such town for the amount, and recover, upon proving the settlement, it would greatly increase litigation,

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and enlarge the expenses of the pauper system. A town might be put to the labor and expense of trying the question of settlement over and over again; and a judgment in their favor on the question of settlement, in a suit by one person, would afford them no bar to a suit by another. But when a town affords relief, either directly by its overseers, or indirectly by paying those persons who have afforded relief, they have a remedy over against the town of the paupers' settlement, limited and regulated by statute. A notice given, if not answered within a limited time, is binding on the question of settlement. So a judgment in one action is conclusive of the question of settlement between the same parties. So the regulations, in regard to the removal of paupers, contemplate the same proceedings as between towns. Rev. Sts. c. 46, §§ 19–21. Nor is such remedy necessary for the person temporarily affording relief, on principles of humanity; because he has a complete remedy against the town, the neglect of whose overseers has subjected him to such expense. *Mitchell* v. *Cornville*, 12 Mass. 333. *New Salem* v. *Wendell*, 2 Pick. 341. *Worden* v. *Leyden*, 10 Pick. 24.

We do not mean to be understood as saying that in no case can a town be bound to support a state pauper, or one having a settlement in another town, though out of its limits at the time. The law allows two or more towns to unite in erecting an almshouse for their common use. It cannot be within the limits of more than one, yet we have no doubt that any pauper in such house, though out of the limits of the town placing him there, must be considered as under the charge of that town. So when a town enters into a contract to support one, whom it is bound to support, in another town, and stipulates to bring such person back, at the expiration of the agreed time, such town might be bound to do so, if the pauper himself, who has a will upon the subject, would consent; and, on their neglect or refusal to do so, might be subject to damages. But it would not found a case for an action on the statute.

The court of common pleas having taken a different view of the law, at the trial, we think the verdict must be set aside and a new trial granted.

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Inhabitants of Colerain *vs.* Walter Bell, Jr. & another.

When a collector of taxes is removed from office, he and his sureties are liable, on his official bond, for such part of the taxes committed to him as are lost by reason of his remissness, although the uncollected taxes have been committed to his successor, who has also given bond for the faithful discharge of the duties of his office.

When the same person is collector of taxes for two successive years, and pays to the town the arrears of taxes collected on the tax list of the first year, with the money collected on the tax list of the second year — the town not knowing whence the money came — and fails to perform the condition of his official bond for the second year, his sureties on that bond, when sued for his default, are liable to the extent of the default, and are not entitled to deduct the amount so paid by him for the taxes of the first year.

When a collector is removed from office within a year after the taxes are committed to him to collect, his sureties, if sued on his official bond, may give evidence, for the purpose of reducing damages, that the uncollected taxes of certain persons on his tax list could not be collected, by reason of their inability to pay. *Aliter*, if the collector was not removed until after a year from the time when the taxes were committed to him.

On the 9th of July 1841, James M. Shearer, as principal, and the defendants, Walter Bell, jr. and Lewis Shearer, as sureties, executed a joint and several bond to the plaintiffs, in the penal sum of $7000. The condition of the bond was thus: "Whereas the aforesaid James M. Shearer has been duly chosen and appointed a collector of taxes, within and for the said town of Colerain, for the year aforesaid; now if the said James M., with all due fidelity, collect and pay over to the several persons, and at the several places, the several sums named in all and singular the tax bills and warrants which shall be duly committed unto him during the said year, or while he shall so be collector of taxes within and for the said town of Colerain, within the several times which shall be therein appointed and limited, and save the said inhabitants harmless from all costs by reason of any negligence and misfeasance of the said James M. in his said office and conduct of collector, as aforesaid, then the foregoing obligation to be null and void."

On the 2d of March 1844, the plaintiffs and the said sureties entered into an agreement, in the manner directed by Rev Sts. c. 114, § 2, to refer the plaintiffs' demands on said bond to the determination of Henry Chapman, Solomon Reed and

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Thaddeus Coleman, Esqrs. These arbitrators returned their award to the court of common pleas, "that the said inhabitants of Colerain do recover of the said Lewis and Walter the sum of $1431·51 damages, and costs of reference, taxed at $40·70, together with the costs of court to be taxed by the court. The said award is made, nevertheless, subject to the opinion and order of the court upon the following legal questions. The damages claimed are for injuries arising to the town from the neglect of said James M. to perform the conditions of said bond. The defendants proved that the said James M. was removed by the town, in 1842, from his said office of collector, and that a new collector was appointed, and new bonds taken. At the time of the said removal and substitution, which was done with the assent and by the request of the sureties, the sum of $615·95 remained uncollected on said James M.'s tax bills. Upon this evidence, the defendants moved the arbitrators to strike out of the plaintiffs' claim the said sum of $615·95; which motion was overruled, upon the ground that the defendants were liable for the damages suffered on the day of the breach of the bond, subject, however, to be cut down by any payments directly or indirectly made by said James M. Shearer, or his sureties, or the new collector, who was one of said sureties. If the ruling of the arbitrators was erroneous, then the court will deduct, from the sum awarded to the town of Colerain, so much of said sum of $615·95, as has not been already virtually credited to the said Lewis and Walter by the said town.

"The evidence further showed that the said James M. was collector of taxes for the year 1840; also that taxes collected by him from bills for the year 1841 were applied by him, in some cases, to cover a deficiency of his payments for the year 1840. Upon this evidence, the defendants claimed that the arbitrators should make an application of these payments to reduce the damages arising to the town from the deficiencies of 1841. This claim was refused by the arbitrators. If the court are of opinion that such payments were in fraud of the rights of the sureties, or that, for any other reason, this ruling

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of the arbitrators was erroneous, then the exact amount of such payments is to be ascertained by evidence, and that sum deducted from the above award.

"The defendants offered to prove that certain persons, taxed in 1841, were unable to pay their assessments; and they claimed that such evidence should be received by the arbitrators, in reduction of damages. But, inasmuch as it also appeared that said James M., the collector, neither distrained the property nor arrested the bodies of said persons, nor applied to the assessors for an abatement of their taxes, it was held by the arbitrators, that the defendants could not give this evidence in mitigation of damages. If this ruling was erroneous, then the amount of such assessments, if any, is to be ascertained by evidence, and the sum, so found, deducted from the award."

The court of common pleas accepted the award, and ordered judgment thereon, and the defendants appealed to this court.

Davis & Devens, for the defendants. These sureties are not liable for the uncollected balance which was committed to the collector who was appointed on the removal of their principal from office. *Sthreshley* v. *U. States*, 4 Cranch, 169. *U. States* v. *Maurice*, 2 Brock. 96. *U. States* v. *Wardwell*, 5 Mason, 82. Nor are they liable for the sums collected by their principal on the rate bills of 1841, and paid by him to the plaintiffs, and by them applied towards the taxes of 1840. As against these defendants, the plaintiffs could not legally thus apply those payments. *U. States* v. *January*, 7 Cranch, 572. *Seymour* v. *Van Slyck*, 8 Wend. 403. Nor can they be held for that part of the taxes of 1841 which was not collectable. *Probate Court* v. *Bates*, 10 Verm. 285. *Selfridge* v. *Lithgow*, 2 Mass. 374. *Brooks* v. *Hoyt*, 6 Pick. 468.

Aiken, for the plaintiffs. The arbitrators deducted from the $615·95 so much thereof as was collected and paid in by the substituted collector. The motion to strike out that full sum must therefore have been made on the ground that the new bond was either a payment, or accord and satisfaction, or a substituted security. But it was neither.

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A debtor has a right to appropriate his payments as he pleases. And as there is no evidence that the plaintiffs knew that the collections for 1841 were applied, by the collector, towards payment of the taxes of 1840, the defendants cannot complain of bad faith on the part of the plaintiffs, and have no legal defence on this point. *Hilton* v. *Burley*, 2 N. Hamp. 196. *U. States* v. *Kirkpatrick*, 9 Wheat. 720. *Seymour* v. *Van Slyck*, 8 Wend. 403. Nor are they entitled to a deduction of the taxes of those who were unable to pay. The collector is chargeable for the taxes of such persons, unless he commits them to prison within a year. Rev. Sts. *c.* 8, § 43. Rev. Sts. p. 804. *Inhabitants of Townsend* v. *Walcutt*, 3 Met. 152.

Dewey, J. The removal of the collector from office did not discharge him from liabilities that had already attached for defaults in the duties of the office. In all cases where, by reason of his remissness in enforcing the collections, the tax had been uncollected, and, from a change of circumstances, was unavailable in the hands of his successor, he would be chargeable therewith.

The question of more importance and difficulty arises upon the point taken in the defence as to the liability of the collector for the taxes of those persons who were, at the time of the assessment, poor and unable to pay their taxes. It is said that, as to such, nothing has been lost by remissness of the collector, and his power of committal to jail being taken away from him by his removal from office, he ought not to be charged with the taxes in such cases. The position taken by the defendants on this point has so much apparent equity, and is so far sustained by the general rule as to damages recoverable for a neglect of official duty, that if the question were to be decided upon the principles of the common law, and irrespective of certain statute provisions directly bearing upon it, we should be strongly inclined to hold that the defendants might show, in avoidance of their liability for certain taxes, that the individuals against whom such taxes were assessed were not, at any time after the tax bill was placed in

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the hands of the collector, of sufficient ability to pay the same, and that a levy of a warrant of distress upon them would have been unavailing. But the statute provisions, found in the acts regulating the collection of taxes, seem too direct and significant to admit of the application of so favorable a principle in favor of the collector. The Rev. Sts. c. 8, § 43, and the "act to amend the revised statutes," p. 804. clearly limit the right to abatement of taxes, assessed upon persons unable to pay them, to taxes assessed upon those who have been committed to prison within one year from the receipt of the tax bill by the collector; except as to such cases as the town may see fit voluntarily to abate as to persons who have been committed after the year. So far as the collector has neglected to commit to prison, within the year after the receipt of his tax bill, he thereby becomes chargeable for the taxes, if the town insist upon his liability, and require payment from him. Assuming, therefore, that the tax bills were in the hands of the collector for the full period of one year before his removal, and that he neglected to commit to prison those who failed to pay their taxes, he cannot now claim a deduction for the taxes of such persons. If he were removed from office before the year had expired, then his liability would depend upon other principles, and he might show, in his discharge, that he had been guilty of no negligence, and that the persons thus taxed had been wholly unable to pay.

The only remaining question is as to the deduction claimed on account of certain sums received by the collector on the taxes for the year 1841, and applied by him in payment of arrearages due from him on the tax bill of the previous year. It is to be remarked that the case stated is not one of a fraudulent appropriation by the payee, in derogation of the rights of sureties. The case discloses no knowledge, on the part of the town, of the source whence the money was derived, which was applied in part payment of the taxes of 1840. Neither is it a case of misapplication of any specific funds which the collector was bound to pay to the treasurer of the town. The specific money received by a collector, in the

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collection of taxes, is his money, and not that of the town. Such being the case, and the payment thereof being received by the town on account of arrearages of taxes of 1840, it cannot be said to be such a misapplication of payment that it should be withdrawn from its original application and applied to the taxes of 1841.

[It was ascertained that the collector was removed from office within a year after he received the tax list of 1841; although the contrary was assumed by both parties, when before the arbitrators. The court therefore ordered the award to be recommitted, that the arbitrators might "hear evidence on the point whether any of the persons taxed were wholly insolvent and unable to pay, so that the town lost nothing by the default of the collector in not distraining or arresting, or what damage the town actually sustained." The defendants afterwards waived the recommitment, and judgment was entered on the award, by their consent.]

JOHN WILSON, Administrator *vs.* LEWIS SHEARER

A distress for the non-payment of a tax cannot be made after the death of the person on whom the tax is assessed.

An oral agreement was made between W. and one of his sons, that the son should take a certain part of W.'s land to the halves: After W.'s death, the son cut the grass on said land, made it into hay, and deposited it in a barn on W.'s farm: W.'s administrator inventoried the hay, and afterwards divided it between himself and the son, in the presence of part of the other heirs of W.: S., a stranger, converted to his own use that part of the hay which was taken by the administrator. *Held*, that said hay, as against S., was the property of the administrator, and that he might maintain an action of trover against S. for the conversion.

THIS was an action of trover, commenced before a justice of the peace, by the administrator of the estate of James White. The declaration alleged that the plaintiff, in his said capacity of administrator, on the 21st of February 1844, was possessed of two tons of hay, and that, on the same day, the defendant, knowing said hay to be the property of the plaintiff, converted it to his own use. The justice rendered judgment

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for the plaintiff, and the defendant appealed to the court of common pleas. At the trial, in that court, the defendant justified the seizure and sale of the hay, as collector of taxes of the town of Colerain, for the non-payment of a tax assessed upon said James White, for the year 1841. It was admitted that said White's tax for that year was $11·71, and that he paid $4 thereof to the former collector. The only fact in dispute was, whether he paid the whole tax to that collector. The jury found that he did. The other facts in the case were then agreed on, as follows:

The hay in question grew on the farm of said White, who died on the 1st of June 1843. The plaintiff was appointed administrator of said White's estate on the 22d of August 1843. Said hay was cut and made in July and August 1843, by a son of said White, who had a family and farm of his own, by a verbal contract between him and said White, made in the winter or spring preceding. This son took 40 acres of his father's farm, and no more, to the halves; and another person took another part of the mowing, on the same terms Said hay was deposited in the barn of the deceased, and was inventoried and appraised as a part of his property; the plaintiff and three of said White's eleven heirs being present at the time of the appraisement. The hay was afterwards divided between said son and the plaintiff, according to the aforesaid verbal contract; and that part of it which was not set off to the son was seized and sold by the defendant.

On the 16th of May 1842, James M. Shearer, collector of taxes for the municipal year 1841, was removed from office, and the defendant appointed in his place by the assessors, who committed to him the tax list, which had been committed to the former collector, with a warrant directing the defendant to collect all the unpaid taxes on said list. The reasons assigned by the assessors for the removal of said James M. Shearer were his remissness and negligence, and his inability or unwillingness to account for taxes collected by him, to the amount of $925. (See Rev. Sts. c. 8, § 40.) In said tax list, thus committed to the defendant, the sum of

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$4 was credited as having been paid by said James White; but it was apparent that the book had been altered. The defendant called on said White for payment of the balance, and was then told by him that he had paid the tax in full. In default of payment of the balance, the defendant, on the 21st of February 1844, took and sold the hay in question, on his said warrant.

On these facts, (and others which were ultimately deemed immaterial,) the case was submitted to the decision of the court of common pleas; and from the judgment of that court an appeal was taken.

H. G. Newcomb, for the plaintiff.

Grennell & Aiken, for the defendant.

Shaw, C. J. 1. The first and leading question in this case is, whether a distress for the non-payment of a tax, upon an assessors' warrant, can be made by a collector, after the decease of the tax payer. In the analogous case of an execution, it has been held that the property left by the deceased debtor cannot be levied upon after his decease. *Jewett* v. *Smith*, 12 Mass. 309. The reason seems to be equally strong in case of a tax warrant, which is in the nature of an execution. The debtor has ceased to have any property in the goods, and the property vests in his administrator, by relation, from the time of the intestate's death. The provision of Rev. Sts. *c.* 8, § 7, which authorizes the distress and sale of the goods of a person who shall refuse or neglect to pay his tax, implies, we think, that there is a person, who is then delinquent, and who may prevent the sale by payment of the tax. It is a means of coercion as well as a mode of obtaining satisfaction.

But further; it is provided in the same chapter, § 15, that when any person, who is taxed, shall die, before payment of the tax, the collector may, in his own name, maintain an action, as for his own debt. This affords an ample remedy, in every case, unless the property is necessary to satisfy a class of more highly preferred claims, when it ought not to be taken. And this leads to another consideration which seems to us quite decisive. When a person dies, his property

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must go into the hands of an administrator, in order that it may be ascertained and identified, and applied to the satisfaction of claims in a certain order. After paying funeral expenses, and those of the last sickness, and of administration, it is to pay, *first*, debts due to the United States; *second*, public rates and taxes; *third*, debts due to all other persons; and if there be not enough property to pay all the debts of any one class, then ratably, in proportion. Rev. Sts. *c.* 68, § 1. If property could be taken out of the hands of the administrator, to pay taxes, it might leave two anterior classes of claims unpaid, contrary to the declared purpose of the statute.

Being of opinion that such a distress could not be lawfully made by a collector, we have thought it unnecessary to consider whether the defendant was duly appointed, and whether his predecessor was lawfully removed, and other questions discussed on the argument.

2. But another objection is raised to the plaintiff's right to recover, namely, that to maintain trover, a plaintiff must prove property in himself; that as this hay was grass and part of the freehold, at the time of the decease of White, the plaintiff's intestate, and as the person, who took it to cut at the halves, had a license only, or at least was a tenant at will only, his license was revoked, and his interest as tenant at will ceased, at the death of the intestate, and the hay was the property of the heirs, as part of the realty, and was not personal property which vested in the administrator.

It is true that the plaintiff must prove property in himself. But this objection comes with an ill grace from the defendant, who, failing to justify himself under his warrant, was a mere stranger; since he returned that he had taken the property as a distress, (of course as personal property,) and the personal property of White, the intestate, which, by operation of law, must have vested in the administrator. But without relying on any such estoppel, we think the plaintiff had sufficient title to maintain this action against one who has no title, and does not claim under the heirs. In the case supposed, the heirs became entitled to the estate at the decease of the ancestor,

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on the 1st of June; and if the tenant was not entitled to emblements, then the right to the growing grass was in the heirs, as tenants in common, and they had a right to affirm the contract with the tenant to make the hay at the halves; and the presumption is, from all that appears, that they did so. As far as they acted at all, they assented to the subsequent division, and the delivery of one half to the administrator, to be by him inventoried. When the rents and profits of real estate have been received by the administrator with the consent of the heirs, they have been regarded, to some purposes, as assets. *Stearns* v. *Stearns*, 1 Pick. 157. At all events, it gives the administrator a lawful possession, and a good title against all persons except the heirs. Besides; the son, who, by agreement with his father in his life time, took the mowing at the halves, was himself one of the heirs, and, as such, tenant in common of the hay. On the division, he took one half, and consented that the plaintiff should hold the other half; which, under the circumstances, was a delivery, and that with the consent of some of the other heirs. This, we think, gave the plaintiff a lawful possession, and a valid title against all but the heirs. Suppose, as it was suggested in the argument, that all parties acted under a mistake, and believed that this hay was the property of the intestate, and, under this mistake, consented that the administrator should take possession of it, and inventory it; the result would be the same, as against the defendant. Such a possession would be sufficient evidence of title to enable the plaintiff to maintain this action. The defendant could avail himself of no such mistake, to take the property without some justifiable cause.

Judgment for the plaintiff.

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David S. Jones *vs.* David N. Carpenter.

Under the Rev. Sts. c. 97, if A. recovers a judgment for costs against an administrator who sues him in the capacity of administrator, and who, in the same capacity, recovers a judgment against A., the execution on A.'s judgment (except so much thereof as may be due to A.'s attorney) may be set off, if required by the administrator, against the execution on his judgment against A.; the administrator being creditor in the latter execution, in the same capacity and trust in which he is debtor in the former.

This was an action of trespass upon the case, brought by the assignee of James Jones, 2d, an insolvent debtor, against a deputy sheriff, for said deputy's neglect to serve an execution in favor of said James.

At the trial in the court of common pleas, before *Cushing*, J. it appeared that said James Jones, 2d, at the March term of said court, in 1843, recovered judgment against Almon Brainard, administrator of the estate of Timothy Lathrop, for the sum of $44·51, costs of suit; that execution issued thereon, on the 24th of April 1843, against the property and bod of said Brainard; that said Brainard, administrator as afore said, at the August term of said court, in 1842, recovered judgment against said James Jones, 2d, for the sum of $70·07, damages, and $9·81, costs of suit, and that an alias execution issued thereon, on the 27th of April 1843; that said Brainard, on the 28th of April 1843, paid to the attorney of said James Jones, 2d, on the first mentioned execution, that part of the costs which belonged to said attorney, viz. the sum of $24·84; that both of said executions were afterwards put into the hands of the defendant, for service; and that he made the following return on said first mentioned execution:

"June 26th 1843. By virtue of this execution, having in my hands an execution in favor of Almon Brainard, administrator of the estate of Timothy Lathrop, the same being put into my hands by said Brainard, with directions to offset said execution, I have applied the balance of this execution, being $19·92, on the execution in favor of said Brainard, administrator as aforesaid, against James Jones 2d, in offset, in full satisfaction thereof, according to law, and so return this execution satisfied in full. D. N. Carpenter, D. Sheriff."

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The counsel for the plaintiff requested the court to instruct the jury, that the plaintiff in the one execution was not, in the same capacity and trust, the defendant in the other execution, and consequently the defendant had no right to offset the executions, but should have levied the execution in favor of said James Jones 2d on the property or body of said Brainard. But the court instructed the jury, that the plaintiff in the one execution was, in the same capacity and trust, the defendant in the other, and that the defendant had a right to offset the executions.

The jury found a verdict for the defendant, and the plaintiff alleged exceptions to the said instruction.

Alvord, for the plaintiff. By the Rev. Sts. *c.* 67, § 11, and *c.* 110, § 3, "when judgment is recovered against an executor or administrator for costs only, the execution shall be awarded against his body, and his goods and estate, as if it were for his wn debt." And by the Rev. Sts. *c.* 97, § 76, "set-off shall not be allowed when the creditor in one of the executions is not, in the same capacity and trust, the debtor in the other." Brainard was not entitled, in his personal capacity, to the money due on his execution against Jones; but he was liable, in his personal capacity, for the costs recovered against him by Jones. He, therefore, was not creditor in one execution in the same capacity in which he was debtor in the other.

Brainard, for the defendant. The Rev. Sts. *c.* 97, § 74, authorize the set-off of executions between the same parties. But it is not necessary that the parties should be nominally the same; it is sufficient that they are virtually the same. *Barrett* v. *Barrett*, 8 Pick. 342. The liability of the administrator to pay the execution against him out of his personal funds does not alter the capacity and trust in which he was sued. See Rev. Sts. *c.* 96, §§ 14, 15.

Dewey, J. This set-off was properly allowed. It was objected that the creditor in one execution was not, in the same capacity, the debtor in the other. In both of the executions the party was described as administrator of the estate of Timothy Lathrop. But then it is said that the execution against

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the administrator, being for costs only, is to be levied upon the body of such administrator, or the goods and estate held in his own right; and therefore the case is not within the Rev. Sts. c. 97, § 74. In the opinion of the court, this creates no valid objection to a set-off. It may be beneficial to the estate of Lathrop that it be allowed, as the costs recovered of the administrator, although primarily chargeable upon him, are to be allowed to him in his administration account, "unless it shall appear to the judge of probate that the suit was commenced or prosecuted unnecessarily, or without any reasonable cause." Rev. Sts. c. 67, § 11. It comes within the spirit of the statute, and indeed within the very language, if we apply it to the description of the parties.

We think the set-off was proper, and that the ruling of the judge of the court of common pleas was correct.

Exceptions overruled.

David N. Carpenter *vs.* Zadock King.

When two persons jointly, or jointly and severally, sign an obligation for the payment of money, one of them may show, by evidence *aliunde*, that he was surety for the other.

In an action of debt on judgment, brought against a surviving judgment debtor, who signed the obligation on which the judgment was rendered, jointly or jointly and severally with the other judgment debtor, he may show, by evidence *aliunde*, that he signed that obligation as surety for the other debtor.

If a creditor informs a surety that the debt is paid by the principal, and the surety afterwards relinquishes security which was given to him by the principal, this is a good defence to an action brought by the creditor against the surety, though the creditor did not intend to deceive or mislead him.

Debt on a judgment of this court, recovered by the plaintiff, at the September term in Franklin county, in 1842, against Cyrus Alden and the defendant, for the sum of $1006·49 damages, and $15·46 costs. The declaration alleged that said Alden had since deceased, and that said judgment remained unsatisfied in part, viz. for the sum of $529·70. The defendant pleaded the general issue, and filed the following specifications of defence: "1st. That the judg-

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ment declared on has been paid. 2d. That said judgment was obtained against the defendant as surety for Cyrus Alden (who is since deceased insolvent) to the plaintiff, on a note; and for the payment of the debt, for which the defendant was surety, said Alden furnished sufficient security to the defendant; and the defendant, by means of untrue representations, made to him by the plaintiff, that said judgment was paid, was induced to relinquish and discharge said security, so that he has now no means of securing himself as surety as aforesaid. 3d. That the plaintiff obtained execution on said judgment at a time when said Alden had sufficient property, which might have been levied upon to satisfy said execution; and the plaintiff afterwards, without the request or assent of the defendant, caused the said execution to be withdrawn, unsatisfied. 4th. That the plaintiff has fraudulently, and with intent to injure and defraud the defendant, done the acts specified in the 2d and 3d specifications."

The plaintiff's counsel objected, that the facts set forth in the 2d, 3d and 4th specifications, if admitted to be true, would constitute no defence to the action, and that evidence to prove such facts was inadmissible.

The judge before whom the trial was had ruled, 1st, that testimony to prove the acts set forth in the 2d, 3d and 4th specifications, as a defence to the action, was inadmissible; and 2d, that testimony to prove the acts set forth in the 2d, 3d and 4th specifications, as evidence of payment under the 1st specification, was inadmissible.

The defendant then offered Aaron Buddington, as a witness under the 1st specification, to testify that he heard the plaintiff tell the defendant, in November 1842, at Leyden, that said judgment had been paid. The plaintiff objected to this testimony, and the judge excluded it. The defendant then offered said Buddington to prove that, at the same time and place, he heard the plaintiff tell the defendant that said judgment had been paid by the note of a third person. The plaintiff objected to this testimony, and it was excluded. A verdict was returned for the plaintiff, and the defendant alleged exceptions.

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Devens, for the defendant. The plaintiff's oral statement that the judgment was paid was admissible in evidence. A receipt, which is as open to explanation and contradiction as oral statements, is evidence of payment of a judgment. See *Hammatt* v. *Wyman*, 9 Mass. 138. *Lewis* v. *Palmer*, 6 Wend. 368. *Brown* v. *Feeter*, 7 Wend. 301.

The facts stated in the 2d and 3d specifications constitute a good defence. *King* v. *Baldwin*, 17 Johns. 384. *Baker* v. *Briggs*, 8 Pick. 128. *Rees* v. *Berrington*, 2 Ves. jr. 542. *Boston Hat Manufactory* v. *Messinger*, 2 Pick. 223. *Harris* v. *Brooks*, 21 Pick. 195. *Smith* v. *Bing*, 3 Ham. 33. *McDonald* v. *Neilson*, 2 Cow. 193. *Dearborn* v. *Cross*, 7 Cow. 48. *Law* v. *East India Co.*, 4 Ves. 824. Those facts would estop the plaintiff to enforce the judgment. *Dewey* v. *Field*, 4 Met 384, 385. *Parker* v. *Barker*, 2 Met. 431. *Rangely* v. *Spring*, 8 Shepley, 137. Greenl. on Ev. §§ 207, 212.

Alvord, for the plaintiff. The 2d specification sets forth no legal defence. In 1 Chit. Pl. (6th Amer. ed.) 506, there is a tabular statement of pleas to debt on judgment, but no such plea or defence as is here relied on is there found. The defendant is not now a surety, though he may have been a surety on the original note. But the note is merged in the judgment. *Ward* v. *Johnson*, 13 Mass. 148. *Andrews* v. *Smith*, 9 Wend. 53. The defendant can have no defence to the judgment which Alden could not have had.

A judgment or specialty cannot be released or discharged, except by a sealed instrument. *Bulteel* v. *Jarrold*, 8 Price, 467. *Davey* v. *Prendergrass*, 5 Barn. & Ald. 187. *Crane* v. *Newell*, 2 Pick. 612, and cases there cited. *Sewall* v. *Sparrow*, 16 Mass. 24.

The 3d specification shows no defence. *Hunt* v. *Bridgham*, 2 Pick. 581. *Bellows* v. *Lovell*, 5 Pick. 307. *Frye* v. *Barker*, 4 Pick. 382. Theobald on Prin. & Surety, § 156. And the 4th specification is merely a repetition of the 2d and 3d. The 1st specification is objected to, not because payment is not a defence, but because the evidence of payment which was offered was not competent.

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Davis, in reply. Though the original contract is merged in the judgment, yet the court, in a question on the judgment, may examine the contract on which it was rendered. *Wyman* v. *Mitchell*, 1 Cow. 316. *Betts* v. *Bagley*, 12 Pick. 580.

The decision was made at September term 1846.

SHAW, C. J. There are several grounds, appearing in the bill of exceptions, upon which the court are of opinion that a new trial must be granted. But as both parties have requested the opinion of the court upon one aspect of the case, which we suppose embraces its true merits, and may be decisive, we have so considered it. We assume then, that King, the defendant, entered into a contract, by promissory note, jointly, or jointly and severally, with Cyrus Alden, for the payment of money to the plaintiff; that the note did not express that either was principal or surety; that in point of fact, if it is competent to prove it by evidence *aliunde*, King was surety for Alden, and that known to the plaintiff; that Alden gave the defendant security to indemnify him against such liability; that an action was brought and a joint judgment recovered against Alden and the defendant, which was satisfied in part only; that the plaintiff, not intending to deceive or defraud the defendant, informed him, that the debt was paid in full, when in fact it was not so; after which, the defendant relinquished his security, Alden died insolvent, and this action was brought against the defendant, as survivor, to recover the balance of the judgment.

This case, we think, presents three questions: 1st. Whether it is competent, when two or more have signed an obligation for the payment of money jointly, or jointly and severally, for one to show, by evidence *aliunde*, that he was surety for the other. 2d. Whether, if such evidence were admissible in a suit on the original contract, that contract is merged and consolidated by the judgment, so that a new debt arises, in which all must be deemed principals, and so that, in an action of debt on the judgment, it is no longer competent to go into evidence *aliunde*, to show that the defendant was surety. 3d. Whether, if a creditor, without any intention to deceive

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or mislead a surety, informs him that the debt is paid by the principal, and the surety afterwards relinquishes his security, this is a good defence in a suit against the surety.

1. It appears to us very clear, that the fact may be proved, by any competent evidence, that, in a contract executed by two, one was principal and one surety, and that it is not necessary that it should so appear by the contract. It is a fact collateral to the contract, and no part of it. It may appear in the body of the instrument, or the term "principal" may be annexed to the signature of the one, and "surety" to that of the other. In that case, the fact and notice of it accompany the note or obligation, into whose hands soever the same may come. Still it is a collateral fact, showing the relation in which the promisors stand to each other. *Baker* v. *Briggs*, 8 Pick. 122. *Harris* v. *Brooks*, 21 Pick. 195. In the last case, the point was directly decided. So, in order to ascertain the relation of the promisors to each other, with a view to a remedy, when one pays the whole, or more than an aliquot part. These remedies are not secured by the original contract, and form no part of it; they are given by law, and do not depend on the fact of their having united in signing the instrument. The instrument is resorted to for the purpose of showing that both were bound. Therefore, where parties were sureties, on different bonds, for the same debt or duty, the law gave a remedy for contribution, in the same manner as if they had united in signing the same bond. *Deering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270. So where two or more have signed a note, not designating either as principal or surety, *primâ facie* both are principals, and if either pay the whole, he shall have contribution. But it may be always shown by evidence *aliunde*, as between themselves, that the note was made wholly for the accommodation of one, showing him to be the principal debtor. If he pay the whole, he has no contribution; if the other pay the whole, he shall have an action for money paid, for the whole amount. *Austin* v. *Boyd*, 24 Pick. 64.

2. Nor do we think that any change, in this respect, is

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made in the rights of the parties, by the judgment. The proof offered does not contradict the judgment. The original cause of action, as between the parties, is merged by a judgment, because the judgment itself is a security of a higher nature. But when it becomes necessary to inquire and ascertain on what contract a judgment was rendered, it may be done. *Wyman* v. *Mitchell*, 1 Cow. 316. There is the same reason for admitting evidence *aliunde*, to show the relations of parties who are joint debtors in a judgment, as in a contract. *Primâ facie*, they are equally as well as jointly liable. Take the common case of a bond, where on the face of it one is principal and the other surety, yet the judgment is joint. By the record, apparently, both are principal debtors. If the grounds of the judgment could not be inquired into, so as to rebut the presumption of an equal liability, the surety, in case of paying the judgment, would have no remedy over against his principal for money paid; and in case the principal should pay it, he would have an action against his own surety for contribution. If it can be inquired into, to adjust the relations of the debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights. Suppose the creditor himself holds collateral security of the principal; it has been often decided that the surety is entitled to the benefit of it, and if the creditor voluntarily surrenders it, he discharges the surety wholly or *pro tanto*. *Hayes* v. *Ward*, 4 Johns. Ch. 123. Would not this principle apply, as well after a joint judgment against the debtors as before? And yet it would involve the necessity of an inquiry into the judgment, to show that it was rendered on a contract in which one was principal and the other surety. The judgment is technically a security of a higher nature, but it is a security for the same debt or duty, as the contract on which it is founded. *Davis* v. *Maynard*, 9 Mass. 242. So if a judgment be rendered on several demands, for some of which a third person is liable, but not for all, the fact may be shown by evidence *aliunde*. *Stedman* v. *Eveleth*, 6 Met. 114.

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3. In regard to the other point, we consider it well settled, by numerous authorities, that when a creditor, who knows that one debtor is a surety, gives him notice that the debt is paid by the principal, and such debtor, in consequence, changes his situation, as by surrendering security, or forbearing to obtain security when he might, or otherwise suffers loss by it, he is discharged. And although the debt has not been paid, and such notice was given by mistake, and without any fraudulent design, it is a mistake made at his own peril, and he shall rather bear the loss than throw it upon one who has been misled by it. *Baker* v. *Briggs*, 8 Pick. 122. *Harris* v. *Brooks*, 21 Pick. 195. Greenl. on Ev. §§ 207, 212. *Dewey* v. *Field*, 4 Met. 381. In general, that which would afford a surety a remedy in equity against his creditor, by injunction, is a good defence at law, when suit is against the surety alone. *King* v. *Baldwin*, 2 Johns. Ch. 554, and 17 Johns. 384. A doubt was suggested in *Baker* v. *Briggs*, 8 Pick. 128, whether the surety could avail himself, in any form, of such matter of defence, in a joint suit against him and the principal; a doubt which has not been resolved, that we are aware of, by any subsequent judicial decision. Here the point does not arise, because the suit is against the surety alone, as survivor.

Verdict set aside, and a new trial granted

JAMES W. FITCH *vs.* DANIEL S. WORKMAN.

When an assignee, under *St.* 1836, c. 238, has in his hands assets of the assignor, more than sufficient to pay, in full, all the creditors who executed the assignment, and declares a dividend to all those creditors, and pays all of them, but one, in full, and pays over a surplus to the assignor, he is liable to the creditor whom he does not pay, in an action for money had and received.

INDEBITATUS ASSUMPSIT for money had and received.

At the trial in the court of common pleas, before *Cushing*, J. it appeared that Sidney S. Workman duly assigned his property to the defendant and Thomas Shearer, under *St.* 1836,

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c. 238, for the benefit of his creditors; that the defendant became party to said assignment, as assignee, and assumed the trust, and that the plaintiff became party thereto, as creditor; that there were assets of the said Sidney S., in the hands of said assignees, more than sufficient to pay all the creditors of said Sidney S., who became parties to said assignment; that said assignees declared a dividend upon the estate of said Sidney S., before this action was commenced, and paid all his creditors under said assignment, except the plaintiff, in full; that there was a surplus, in said assignees' hands, of about $400, which they paid over to said Sidney S.; and that they reconveyed to him real estate of considerable value.

It further appeared that a dividend was declared to the plaintiff, under said assignment, and that it had not been paid to him; that he demanded the same of the defendant, before this action was brought, the said Shearer, the other assignee having died before said demand was made.

The court ruled that the foregoing facts did not support this action; and that the plaintiff's only remedy was under § 7 of *c.* 238 of *St.* 1836, by petition or other application to the supreme judicial court. To this ruling the plaintiff alleged exceptions.

Brainard, for the plaintiff, cited 2 Stark. Ev. 95, and 1 U. S. Digest, Assumpsit, VI.

Devens, for the defendant, cited *Shattuck* v. *Freeman*, 1 Met 15, and *Dedham Bank* v. *Richards*, 2 Met. 105.

Dewey, J. The question raised in this case is, whether an action of indebitatus assumpsit for money had and received may be maintained upon the facts here stated. The only liability of the defendant arises from the receipt of money, the avails of certain property assigned to him, under the provisions of *St.* 1836, *c.* 238. It is insisted by the defendant, that the only remedy for the plaintiff is by a bill in equity, or petition, under the provisions of § 7 of that statute. The course of argument is, that where new rights or liabilities are created by statute, and a remedy is therein prescribed, the mode thus prescribed is the proper and the only remedy to enforce

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claims arising under the statute. Without questioning the general principle thus stated, the case before us presents a state of facts which will authorize a recovery by the plaintiff. Under a different state of facts, a proceeding under § 7, or by a bill in equity, might be the appropriate remedy for enforcing a settlement of the account of the assignee and a distribution of the assets among the creditors. Such form of proceeding would be requisite to compel the assignee to collect the assets, and render the same available, or to settle the conflicting claims of creditors, and adjust the respective amounts to be paid to each. But this case presents the unusual result of a solvent estate in the hands of an assignee, thereby enabling him to pay to the creditors their entire demands, and an actual payment of all other creditors but the plaintiff, and a surplus paid to the debtor. Upon this state of facts, the parties in interest are reduced to the plaintiff and defendant. The assignee has properly closed the concerns of the debtor, and made the assets available in cash; and no other duty remains but that of paying over to the plaintiff the amount of his demand. Under these circumstances, we think the defendant held this money for the use of the plaintiff; and that as payment of the same has been refused, after a demand therefor, this action may be maintained.

New trial granted.

JOSIAH BOYDEN *vs.* WILLIAM BOYDEN & another.

If an infant buys goods on credit, and retains them in his own hands and uses them for his own purposes, for an unreasonable time after he comes of age, without restoring them to the seller, or giving him notice of an intention to avoid the contract, it operates as a ratification of the contract, and renders the buyer liable in an action for the price of the goods.

ASSUMPSIT for goods sold and delivered, and on the money counts. Writ dated March 2d 1843. At the trial in the court of common pleas, before *Williams*, C. J. the plaintiff gave in evidence a promissory note for $44, given to him by

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the defendants on the 12th of April 1838. The defence was infancy; and the defendants introduced evidence tending to prove that one of them was born February 9th 1818, and the other August 11th 1819. There was also evidence tending to prove that the said note was given for a horse and plough, bought of the plaintiff by the defendants; and that they kept the said horse and used him, about a year after buying him, and then exchanged him for another horse. There was no evidence that the defendants had disposed of the said plough, or that they, or either of them, ever offered to restore the said horse or plough to the plaintiff, or ever, in any way, gave notice of their intention to rescind and avoid their said contract.

The judge instructed the jury, that if the defendants retained the property, for which the note was given, in their own hands, and used it for their own purposes, for an unreasonable time, after arriving at the age of twenty one years, without restoring it to the plaintiff, or giving him notice of their intention to avoid the contract, it operated as a ratification of said contract, and rendered the defendants liable in this action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions to said instructions.

This case was argued at the last September term.

H. G. Newcomb, for the defendants. A mere acknowledgment by a party, after he comes of age, of a debt contracted by him during infancy, is not a ratification. Some positive act or declaration of his, tantamount to a new contract, is necessary to defeat his power of avoiding the old one. *Rogers* v. *Hurd*, 4 Day, 57. *Wilcox* v. *Roath*, 12 Connect. 550. *Goodsell* v. *Myers*, 3 Wend. 479. *Whitney* v. *Dutch*, 14 Mass. 460. *Ford* v. *Phillips*, 1 Pick. 203. *Thompson* v. *Lay*, 4 Pick. 48. *Peirce* v. *Tobey*, 5 Met. 172. The mere retention, after coming of age, of the consideration for which a note was given during infancy, is not a ratification. *Benham* v. *Bishop*, 9 Connect. 330 See also *Roof* v. *Stafford*, 7 Cow. 179.

Alvord, for the plaintiff, cited 2 Kent Com. (3d ed.) 238. 1 Rol. Ab. 731. *Kline* v. *Beebe*. 6 Connect. 494. *Richardson*

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v. *Boright*, 9 Verm. 371. *Hubbard* v. *Cummings*, 1 Greenl. 11. *Dana* v. *Coombs*, 6 Greenl. 89. *Lawson* v. *Lovejoy*, 8 Greenl. 405. *Delano* v. *Blake*, 11 Wend. 85. *Boston Bank* v. *Chamberlin*, 15 Mass. 220. *Hoit* v. *Underhill*, 9 N. Hamp. 436. *Badger* v. *Phinney*, 15 Mass. 359.

Shaw, C. J. The questions as to what contracts of an infant are void, and what voidable, and, in the latter case, what shall be deemed a disaffirmance, and what a ratification, are questions which have been much discussed, and in respect to which there are conflicting authorities. It is not my intention now to review them. Some points seem to be well settled.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. *Whitney* v. *Dutch*, 14 Mass. 457. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor. *Badger* v. *Phinney*, 15 Mass. 359. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it,

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such detention, use or disposition — which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own — is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plough, one of the articles for which the note was given, between two and three years after they both came of age. Whether, if the contract had been rightfully disaffirmed, the vendor could have reclaimed the horse received by the defendants, in exchange for the one sold, after one of the defendants came of age, but not the other, we give no opinion. Retaining the plough brings the case within the principle. The court are of opinion that the directions of the judge at the trial were right, and well adapted to the case presented by the evidence. See *Boody* v. *McKenney*, 10 Shepley, 517.

Exceptions overruled

MARTIN ARMSTRONG *vs.* INHABITANTS OF WENDELL.

Under the Rev. Sts. c. 25, § 13, the only authority of a surveyor of highways to charge a town for repairs of a road, when the highway tax is insufficient therefor, is by employing other persons to make such repairs; and those persons, and not the surveyor, may recover pay of the town for their labor.

ASSUMPSIT for work done by the plaintiff and his servants, in 1843, upon the highways in Wendell. The action was commenced before a justice of the peace, who rendered judgment for the defendants; whereupon the plaintiff appealed to the court of common pleas. At the trial in that court, before *Cushing*, J. it appeared that the plaintiff was duly chosen and sworn as surveyor of highways in Wendell, for district No. 6, for the year commencing in April 1842. The plaintiff produced, from the hands of the selectmen of Wendell, the highway rate bill, which was committed to him as such surveyor and which he had returned to said selectmen after his term of

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office had expired. For the purpose of showing that the sums, assessed upon the persons whose names were borne on said rate bill, were worked out before the 15th of February 1843, the plaintiff introduced a witness, who testified that he saw and examined said rate bill, on that day, and that it then bore the same marks and crosses which appeared on it when brought into court, and that all the names thereon were then crossed out. This witness (who had been a surveyor of highways) and others testified that the general custom in Wendell was, for the surveyors to make return of their highway rate bills thus crossed, without any further return or indorsement thereon; that the crosses against the sums assessed indicated payment, and were so understood; and that the officers of the town had settled with the surveyors upon such returns of highway rate bills. Another witness, introduced by the plaintiff, testified that, in the spring of 1843, the plaintiff returned to one of the selectmen of Wendell an account, in writing, of his over-work, and demanded payment therefor, and that said selectman told him that the selectmen had determined not to pay surveyors for over-work.

The plaintiff claimed ten dollars for over-work done upon the roads in district No. 6, between February 15th and April 1st, 1843, by himself, with his teams, sleds and ploughs, in removing obstructions in said roads, caused by drifts of snow. And there was evidence that work was so done, by the plaintiff, between said days, and that it was necessary work and of the value of ten dollars and upwards. Upon the evidence, the court ruled that the action could not be maintained. The plaintiff thereupon became nonsuit, and alleged exceptions to said ruling.

Brainard, for the plaintiff. The Rev. Sts. *c.* 25, § 3, make it the duty of a surveyor to remove or tread down snow that incumbers a road; and by *c.* 15, §§ 82, 83, he is liable to a penal action, and to an indictment, for neglect of that duty. The case of *Loker* v. *Inhabitants of Brookline*, 13 Pick. 343, is like this, in its facts; but it was decided on *Sts.* 1786, *c.* 81, and 1796 *c.* 58. The case at bar rests on Rev. Sts. *c.* 25, § 13

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Davis & Alvord, for the defendants. The plaintiff's evidence was not such as would warrant a jury to infer that there was "a deficiency, either of labor or money, in the amount appropriated for the repair of highways" in district No. 6. The rate bill was not returnable until July 1843, (Rev. Sts. *c.* 25, § 19,) and the crosses on the bill, if competent evidence at all, only tended to show that the plaintiff had collected the money, and not that it was expended on the roads. Rev. Sts. *c.* 25, § 11. *Cator* v. *Stokes*, 1 M. & S. 599. *First* v. *Miller*, 4 Bibb, 311. *Hathaway* v. *Goodrich*, 5 Verm. 65. *Davis* v. *Clements*, 2 N. Hamp. 390.

The Rev. Sts. *c.* 25, § 13, on which the action is founded do not authorize a surveyor to work on the roads himself, or to employ others to work on them, and recover pay of the town for himself. He may act in behalf of the town in employing laborers, but they are to look to the town for pay.

The decision was made at September term 1846.

Shaw, C. J. We do not see how the plaintiff has avoided the force of the suggestion that it does not appear that he had worked out the whole of his highway tax in February 1843. Suppose the evidence offered by him shows that the tax bill had been wholly collected at that time; yet it does not appear that the amount had been expended, or that he had not money in hand. But we lay no great stress on this, because we think there is another point quite decisive. The rights and powers of surveyors of highways are regulated by statute, and a surveyor cannot, when he has expended his tax, proceed and do work on the roads, at his discretion, and charge the town. By force of the statute, he may bind the town, in case of deficiency either of labor or money, in the amount appropriated for the repair of highways, by his contract with a third person, to the amount of ten dollars. The words are, "he may employ any persons to make such repairs, and the persons so employed shall be paid therefor by the town; provided that the sum so expended by any such surveyor shall not exceed ten dollars." Rev. Sts. *c.* 25, § 13. By this provision, it seems to us quite clear that his whole authority is,

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to bind the town by his contract, he acting solely as their disinterested agent. And it appears to us that there are good reasons for this. If he employs another person, on the authority of the town, he pledges his official responsibility for the existence of the exigency, and the fairness of the price; he acts exclusively for the town, and they have the benefit of his disinterested judgment and official sense of duty as their agent.

It may be proper to add, that this provision of the revised statutes, authorizing the surveyor to bind the town by his contract, to the extent of ten dollars, has altered the law that was in force at the time of the decision of *Loker* v. *Inhabitant of Brookline*, 13 Pick. 350. *Nonsuit to stand.*

RICHARD E. NEWCOMB, Judge, &c. *vs.* HORACE WILLIAMS & others.

A testator appointed A. & B. his executors, and gave to his nephews all his property that should remain after payment of his debts, &c.: He also appointed B. trustee of said remaining property, empowering him to take possession thereof, and directing him to invest it on good security on interest, until he should have occasion to make payment according to the further provisions of the will, viz. to pay it to the testator's nephews, in equal shares, as they should respectively come of age: A. & B. rendered an administration account, and the balance was retained in the sole possession of B., who gave no bond, as trustee: No further administration account was rendered by A. & B.: B. rendered a separate account, and a decree was thereupon passed that he should pay the balance thereof to the testator's nephews, according to the directions of the will; but B. failed to perform this decree. *Held*, in a suit on the bond given by A. & B., as executors, that they were jointly answerable for the testator's property, and that they and their sureties were liable for the amount of the distributive shares of the testator's nephews.

Under Rev. Sts. c. 70, a legatee cannot put in suit, for his own benefit, the executor's administration bond, and have execution awarded for his own use.

In all cases of suits on administration bonds, except those mentioned in Rev. Sts. c. 70, §§ 3, 4, 5, execution is to be awarded, without expressing that it is for the use of any particular person; and all money received on any execution so awarded is to be paid, as directed by § 11, viz. to the co-executor or co-administrator, if there be any, or to whoever shall then be the rightful executor or administrator; and the money so paid will be assets, in his hands, to be administered according to law.

When an executor, who is unfit to be such, is sued on his administration bond, in a case in which execution is to issue without expressing that it is for the use of any particular person, the judge of probate should remove him, and appoint an administrator *de bonis non*, with the will annexed, who will be entitled to the money that may be received on such execution.

DEBT on a probate bond in the penal sum of $3000, dated December 18th 1827, executed by Amos Russell and Horace

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Williams, as principals, and Russell Cooley and Aaron Arms, as sureties. Writ dated August 27th 1844. On the writ was this indorsement: "This action is brought, by leave of judge of probate, for benefit of David Crafts and Roswell Crafts, and other legatees of late Roswell Crafts."

Said Amos and Horace were executors of the last will of Roswell Crafts, and the condition of the bond was such as is now required of executors by the Rev. Sts. *c.* 63, § 2, except that, as to the return of an inventory, no mention was made of the testator's *real estate.*

The following breaches of the condition of the bond were assigned by the plaintiff: "Although said Amos and Horace were duly cited, in March 1843, to render an account of their administration, under oath, yet the said Horace has neglected and refused so to do. And although goods and chattels, rights and credits, of the said Roswell, to a large amount," to wit, &c. "have come into the hands and possession of the said Amos and Horace, yet they have not kept the same, but have suffered them to be entirely wasted and consumed. And whereas the will of said Roswell, among other things, provided that his estate, after paying debts and charges, should be kept by the said Amos, in trust for the benefit of certain persons therein named, and the said Amos, on the death of said Roswell, declined the acceptance of said trust, or to receive or retain said estate, as such trustee, yet the said Amos and Horace, well knowing the premises, and that the will contained no provision for filling the vacancy thus created, did not apply for or cause the appointment of any trustee to fill the vacancy thus created. And that, on the 27th day of August 1844, at a court of probate then held at Greenfield, by the plaintiff, a decree was passed, as follows: 'In the matter of the separate account of Amos Russell, as one of the executors of the last will of Roswell Crafts, it is decreed that the said account, as corrected, be allowed; and it appears that a balance remains in the hand of said executor, of $1119·11; and it is further ordered that the shares of David Crafts and Roswell Crafts, two of the legatees under said will, be distributed and paid out to them, according to the provisions of the will of the

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testator:' That on the same day the said David Crafts and Roswell Crafts, legatees under said will, being of the age of twenty one years, and of good moral character, became entitled to demand and receive of said Amos and Horace their respective shares aforesaid, and thereafterwards, on the same day, demanded of the said Amos the distributive share so due to each of them, and the said Amos neglected and refused to pay the same."

The case was submitted to the court upon the following statement of facts: The last will of Roswell Crafts, made on the 7th of September 1827, was thus: "*First.* It is my will that all my just debts, and the charges of my funeral, be promptly paid out of my estate, by my executors hereinafter named and appointed. *Second.* I give and devise all my property, after my just debts and funeral charges are paid, in equal shares, to Josephus Crafts, Chester Crafts, jr., Roswell Crafts, 2d, and Albert Crafts, all sons of my brother Chester Crafts; all of my said property, however, to be subject to the directions and dispositions hereafter given and made in this my last will. *Third.* I nominate, appoint and declare Amos Russell of Deerfield, to be my trustee of all my said property, except so much of the same as my executors will require to discharge my just debts and funeral expenses; hereby empowering him, immediately after my decease, to take full possession of the same. And it is my will that my said trustee shall keep all such moneys of mine, as he shall receive after my decease, at interest upon good security, until he shall have occasion to pay the same according to the following directions. *Fourth.* It is my will that my said trustee pay, at his discretion, to my honored mother, Roxilany Crafts, so much money, annually, as shall afford her a comfortable maintenance and support; provided, however, that my said trustee shall not pay to my said mother more than seventy two dollars per year. *Fifth.* It is furthermore my will that my said trustee, after deducting the sum of twelve hundred dollars from the original amount of my property, (the interest of which sum being assigned, in part or wholly, for the use and support of my said mother, as heretofore provided,) shall pay equal shares

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of the balance of the same, together with the interest which shall have accrued thereon, to the said Josephus Crafts, Chester, jr., David, Roswell, 2d, and Albert, upon their respectively arriving at the age of twenty one years, that is to say, during the life of my said mother; and after the decease of my said mother, it is my will that my said trustee shall pay to all such of the said Josephus, Chester, jr., David, Roswell, 2d, and Albert, as shall have arrived, at the time of her decease, at the age of twenty one years, equal shares of the said sum of twelve hundred dollars, together with the interest thereon that shall not have been appointed to the use of my said mother, and thereafterwards proceed to pay such of the said Josephus, Chester, jr., David, Roswell, 2d, and Albert, as shall thereafterwards arrive at the age of twenty one years, upon their arriving at that age, their equal shares of the above mentioned balance of money left after deducting, as aforesaid, and the interest thereon, together with the said sum of twelve hundred dollars, with so much of the interest on the last mentioned sum, as shall not have been appointed to the use of my said mother, as aforesaid. Provided, however, that if the moral character and conduct of either or any of the said Josephus, Chester, jr., David, Roswell, 2d, and Albert, upon their respectively arriving at the age of twenty one years, shall not be good, then it is my will that my said trustee shall pay to such or any of them whose moral character and conduct shall not be good, if any, their respective shares, at the discretion of him my said trustee. *Sixth.* I hereby nominate, constitute and appoint Amos Russell aforesaid and Horace Williams, both of Deerfield, to be my executors of this my last will and testament."

This will was duly proved and allowed on the 18th of December 1827, and the defendants, on that day, executed the bond declared on by the plaintiff. The executors named in the will rendered to the plaintiff the first account of their administration, on the 14th of October 1828, in which they charged themselves with the personal estate of their testator as per inventory, and cash in the hands of Aaron Russell, one

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of the executors, to the amount of $1833·01, and prayed allowance, for payments, &c. made by them, (including $37·25 paid to Roxilany Crafts, the testator's mother,) to the amount of $182·31; leaving a balance of $1650·70 against them; which account was allowed and recorded.

The said Horace Williams, one of the executors, never had the possession, nor exercised any control, of any of the property of the testator; but the management of said property was entirely by said Amos Russell, the other executor.

Said Russell never gave any bond, as trustee, nor did the plaintiff ever allow or fix any time for that purpose; but the plaintiff did, at some time, ask him to give bond, and he replied that he would not. No measures were taken by any one to have a new or other trustee appointed. Said Russell is now insolvent, and has been for the last three years.

Early in the year 1843, the said Josephus Crafts, and the other nephews of said testator, mentioned in his will, petitioned the plaintiff to cite said executors to render a second account of their administration, and a citation was issued by the plaintiff accordingly. On the 14th of March 1843, said Horace Williams, one of said executors, appeared before the plaintiff, on said citation, and made answer thereto, that he rendered an account, jointly with said Amos Russell, on the 14th of October 1828, of all the testator's property, in the hands of said Russell; and that, after the rendition of that account, no part of said property came to said Williams's hands or possession, but that said property was in the hands and under the control of said Russell, as trustee, according to the intent of the testator's will; and that said Russell had ever since held said property as guardian of the legatees under the will. Wherefore, said Williams prayed that a final discharge might be granted to him. The plaintiff, on the same day, passed an order that said Russell and Williams should render a second account on the 22d of May 1843. But this order was not obeyed by said Russell and Williams.

On the 27th of August 1844, said Russell rendered a separate account of his administration, which was allowed, and the

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decree passed thereon which is set forth by the plaintiff in his last assignment of the breaches of the condition of said bond. And a demand was made on said Russell, before the commencement of this action, by the attorney of said legatees, for the payment of their distributive shares.

Only one of said legatees, viz. David Crafts, for whose use this action is brought, is twenty one years old; and he is of good moral character.

If the court shall be of opinion, on these facts, that a decree of the court of probate, ordering said Amos Russell and Horace Williams, as joint executors, to pay to any one of the legatees his distributive share, would have been legal, then judgment shall be for the plaintiff for such amount, and in such mode, as the court shall order.

Davis & Devens, for the plaintiff. The executors are jointly answerable for the testator's property, until they show that it has passed from them, as such, to the trustee. This is not shown. The trustee declined the trust and refused to give bond. He therefore held the property as executor, jointly with his co-executor. *Hall* v. *Cushing*, 9 Pick. 395. *Pratt* v. *Northam*, 5 Mason, 95. The bond given by the executors covers the trustee's liability. *Dorr* v. *Wainwright*, 13 Pick. 331, 332. Co-executors are liable on their bond, as joint obligors, for the acts of each other to which they assent. Bac. Ab. Executors & Administrators, D. 2. *Brotten* v. *Bateman*, 2 Dev. Eq. Rep. 115. *Clark* v. *Clark*, 8 Paige, 160. *Brazier* v. *Clark*, 5 Pick. 96. *Towne* v. *Ammidown*, 20 Pick. 540 *Clarke* v. *State*, 6 Gill & Johns. 288. *Babcock* v. *Hubbard*, 2 Connect. 539. *Anderson* v. *Miller*, 6 J. J. Marsh. 571. *Morrow* v. *Peyton*, 8 Leigh, 54. *Brice* v. *Stokes*, 11 Ves. 319. *Booth* v. *Booth*, 1 Beavan, 125. 2 Stephens Nisi Prius, 1864. 2 Story on Eq. §§ 1280, 1284.

Aiken, for Williams and the sureties. The will is to be examined, in order to ascertain what the defendants' bond covers, and what the joint executors were bound to do. The will gives the possession and custody of the property to Russell, as trustee, and prohibits the executors from managing it.

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The legal interest in the property was vested in Russell, and he was to make payments, at his discretion, to the testator's mother, and to withhold payment from any legatee whose moral character should not be good. The only power given to the executors was, to take property sufficient to pay debts and charges, and pay them. This was to be done by the executors jointly. All other acts were to be done by Russell, as trustee, or by a successor in the trust, to be appointed by the judge of probate, according to the law existing when the will was proved.

Sureties are not liable for acts of executors which they had no power to do jointly. *Towne* v. *Ammidown*, 20 Pick. 535. Nor are the liabilities of these sureties varied by the executors having rendered one joint account, in ignorance of their rights and duties.

In cases of *implied* trusts, executors are liable as executors, because no other person has power to act as trustee, and the will is carried into effect by making the administration bond cover the property. But in the will now before the court, the trust is *express*. And in *Dorr* v. *Wainwright*, 13 Pick. 328, the implication is strong, if not irresistible, that an executor's bond does not cover trust property, when a trustee is appointed. In *Hall* v. *Cushing*, 9 Pick. 395, the trust was an implied one. Some of the *dicta* in that case seem to favor this plaintiff; but they were *obiter*. In *Wyman* v. *Hubbard*, 13 Mass. 234, which was also a case of implied trust, Parker, C. J. said, the sureties of the executors were not bound for their faithfulness as trustees.

By *St.* 1817, *c.* 190, §§ 37, 38, 40, which was in force when this bond was given, provision was made for new trustees, in cases of an express trust, and for the vesting of the trust property in them. Sect. 40 seems to have been framed on the supposition that an executor's bond did not cover express trusts. If it did, there was no more occasion for legislation than in cases of implied trusts, where such bond does cover the trust property

Shaw, C. J. This is an action of debt on a probate bond,

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brought in the name and by the authority of the judge of probate, upon the application of the nephews and legatees of Roswell Crafts deceased, against Amos Russell and Horace Williams, the executors of said Roswell's will, as principals, and Russell Cooley and Aaron Arms, as sureties on said bond. The case comes before the court upon an agreed statement of facts; and the question is, whether, to account for the estate of the testator, and pay over the same, is a joint duty of both executors, for the performance of which they and their sureties, by force of the probate bond, are responsible; or whether under the circumstances, that duty has devolved on Amos Russell alone, as trustee, so that his co-executor and the sureties are discharged. The bond is in the usual form of an executor's bond, conditioned to return an inventory, render an account, and administer the estate according to the will. The executors returned an inventory and rendered a joint account, charging themselves with the personal property of the testator.

It appears to us, very clearly, that by these proceedings, and by operation of law, the executors became responsible for the personal property of their testator, and that they must remain thus responsible until some legal discharge is shown. The counsel for Williams, the co-executor, maintains, in behalf of him and the sureties, that they are so discharged by the fact agreed, namely, that the property went into the hands of Amos Russell; that he, as a trustee specially appointed by the will, was the proper person to take it and hold it, and that the executors are thereby exonerated.

The will, after giving the whole of the residue of the property to the five nephews, directs that this shall be subject to particular directions which he gives. He then goes on to appoint Amos Russell, one of the executors, a trustee of all his property, except so much as the executors will require to pay debts and expenses; empowering said Russell, immediately after the testator's decease, to take full possession of the same, and keep it at interest on security; to apply the income of a part to the support of his mother, and, subject to that appropriation, to pay over the residue to said nephews, in

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equal shares, as they shall respectively arrive at twenty one years of age.

Now it is argued, that as the testator had the *jus disponendi*, and did direct the property, immediately after his decease, to go into the exclusive possession of the trustee, it was rightly disposed of, according to the will, and the executors, as such, had no further control over it, and were no longer responsible for it. This argument is plausible; but we think it is fallacious, and founded on a misconception of the powers of the testator, and the relative rights and duties of an executor and a trustee. It is not legally correct, to say that a testator has the *jus disponendi* of his property; it is true only *sub modo*. The executor, as such, is bound to administer the whole estate, as well that not given by the will as that embraced in it. *Hays* v. *Jackson*, 6 Mass. 149. The first claim on the estate is that of creditors; and it cannot be known, until an inventory is returned and an account settled, whether the whole estate will not be necessary for the payment of debts. So children or their issue, who have no share given them, and posthumous children, are entitled to the same distributive shares which they would be entitled to if the estate were intestate. Rev. Sts. *c.* 62, § 21. These claims are paramount to those of legatees, and no disposing power of the testator can defeat them. To meet these claims, and enable the executors to perform the trust which the law devolves upon them, the whole property must, in the first instance, come to them, and be disposed of, in an orderly course of administration, which the testator cannot control. For this purpose, it is an established rule of law, that all the personal property of the testator vests in the executors, for some purposes, before probate of the will; but to all intents and purposes, upon its probate. This they take, not merely as donees, by force of the gift, as *inter vivos*, but by operation of the rules of law controlling, regulating and giving effect to wills. A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of

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one or more trustees, for particular purposes, such direction would be nugatory and void; and it being a will in which no executor is appointed, it would be the duty of the judge of probate to appoint an administrator with the will annexed, who would have all the powers of an executor, and in whom all the personal property would vest. Rev. Sts. *c.* 63, § 1.

Being of opinion that, by this will and the acts done under it, the executors became jointly possessed of the personal property, and responsible for it, we are then to consider, whether the taking of it, by one of them, who was also sole trustee, under the circumstances stated, discharges the executors.

When the executors and the trustees are different persons, there is no difficulty; nothing but an actual payment to the trustees, by the executors, will discharge them. So if the trust is cast upon them as executors, the execution of such trust is a duty superadded to their official duties as executors, and until they qualify themselves, and assume to act in their separate capacity, as trustees, the bond to perform their duties, as executors, binds themselves and their sureties to the execution of such trust. *Hall* v. *Cushing*, 9 Pick. 395. *Dorr* v. *Wainwright*, 13 Pick. 328. *Towne* v. *Ammidown*, 20 Pick. 535. What would amount to such change of capacity, when the same persons are executors and trustees, so as to exonerate the sureties on the executorship bond, would depend on circumstances. If, by the constitution of the trust, they were exempted from giving bonds, as they may be, (Rev. Sts. *c.* 69, § 2,) it would probably be held sufficient — as no actual payment can be made to one's self — to show, by any authoritative and notorious act, that they had elected to act in the capacity of trustees; as for instance, if they claim a credit in their executorship account, filed in the probate office, for a sum, held by themselves as trustees, and also file an inventory or account, charging themselves with the like sum as trustees. 9 Pick. *ubi sup.* But, when a bond to the judge of probate is required, such transmutation of the property cannot be complete, so as to discharge the executors, until such

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bond has been given. Rev. Sts. *c.* 69, § 1. And we think the same rule applies when one of the executors is himself trustee. Such charge in the one capacity, and claim to be discharged in the other, would avail, if no bond were required. But it is a general rule, applicable to this in common with other cases, that executors must see, at their peril, that they pay legacies to persons legally authorized to receive them, and that a literal compliance with the directions of a will is not in all cases, sufficient. Suppose legacies to persons named who are found to be infants, persons under guardianship, as *non compos*, or spendthrift; a payment to the infant, *non compos*, or spendthrift, would be no valid discharge. So if a legacy be to a man and his heirs, and the legatee die, after the testator, and before payment; a payment to the heir would not be legal; it must be to the personal representative. So we think payment to one named as trustee, but not qualified to act as such, would be no valid payment. He may have declined or resigned the trust, or neglected, on notice, to give bond; by which he shall be considered as having declined; or he may have been removed. Rev. Sts. *c.* 69, §§ 4, 7. In any of these cases, a payment to the trustee named in the will would be a payment by the executors in their own wrong, and no valid discharge. What would be sufficient proof of the qualification of a trustee, is not now in question; probably a commission or certificate from the probate court would be a sufficient warrant. But, in the present case, the trustee could not be qualified without giving bond; being within none of the exemptions in Rev. Sts. *c.* 69, §§ 2, 3; and being himself one of the joint executors, his knowledge of the fact was constructive notice to his co-executor. Besides; even if it were a case where the trustee was exempted by law from giving bond, the result would be the same; because here was no authoritative and notorious act done by the executors, indicating an intent to discharge themselves as such, by placing the property in charge of the trustee; and no similar act on the part of the trustee named, indicating an intent to assume such trust.

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The court are therefore of opinion, that the executors are jointly liable for the balance of the personal property of the testator, which, it appears by the accounts, has come to their hands, and not been paid over.

We think the judgment, in the present case, requires some particular attention; the more so, as we think the revised statutes have introduced some changes of the law in this respect, and at least have given much more precision and exactness to the law and practice in regard to the judgment and other proceedings, in suits on probate bonds.

By the former statutes, certain creditors and distributees were authorized to bring suit, for their own benefit, on the probate bond, in which, after a judgment for the whole penalty for the judge of probate, such persons had an award of execution to their own use. In other cases, judgment was rendered generally for the judge of probate, for the benefit of all concerned. It might be doubtful, perhaps, upon the law as it stood, whether a legatee, whose right was not ascertained by a judgment, could have a suit on the bond to his own use. In some cases, it was implied, from the decisions of the court, that such suit could be maintained, after demand of the executor and refusal of payment. *Paine* v. *Gill*, 13 Mass. 365. *Prescott* v. *Parker*, 14 Mass. 428. But the directions of the Rev. Sts. *c.* 70, are clear and explicit, and are fully explained by the report of the commissioners for making that revision There are three cases, and three only, in which a person may sue the probate bond for his own benefit, without application to the judge, making a special indorsement thereof on the writ, and have a special award of execution to his own use. 1. A creditor of a solvent estate, who has a judgment against the executor. 2. A creditor of an insolvent estate, for his share, after a decree of distribution. 3. A person next of kin and distributee of an intestate estate, after a decree of distribution in his favor. In each case, the party so suing must have demanded the amount of the executor or administrator, and he must have refused or neglected to pay. Rev. Sts. *c.* 70, §§ 3, 4, 5, 10. In all these cases, it will be perceived

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that the right of the claimant is liquidated and ascertained by matter of record, amounting to a conclusive judgment between the parties, and that nothing remains but payment. These cases exclude that of a legacy. And why should it not be excluded? Though it be a pecuniary legacy, and a sum certain, yet the executor may not be bound to pay it. There may be no assets for its payment, and so it must fail; or no assets to pay all legacies of the same class, and so it must abate in proportion. Besides; the legatee, like all other claimants, has his remedy by action, and, if there be no defence, must have judgment for his legacy.

But to proceed: The Rev. Sts. *c.* 70, § 6, provide that when it shall appear to the judge of probate, on the representation of any person interested in the estate of a deceased person, that the executor or administrator has failed to perform his duty, in any other particular than that of failing to pay a creditor or next of kin having a judgment or decree, he "may authorize any creditor, next of kin, *legatee*, or other person aggrieved by such maladministration, to bring an action on the bond." Here, it will be perceived, legatees are enumerated among those who have claims on the estate, and not those who have a right to sue the bond for their own benefit.

It is also to be noted, that in case of a suit brought generally, in the name of the judge of probate, the writ is to be indorsed by those at whose request it is brought; and in case of costs for the defendant, judgment shall be entered for such costs against such indorser, and not against the judge of probate; which, it is believed, is a change of the former law. Rev. Sts. *c.* 70, § 7.

But the most material provision is in the third and fourth subdivisions of § 10, namely, that in case of such suit for the general benefit, execution shall be awarded in the name of the plaintiff, the judge of probate, without expressing that it is for the use of any other person. Sect. 11 provides that "all moneys received on any execution issued as aforesaid, (unless the execution be awarded for the use of a creditor or person next of kin, as provided for in the first and second sub-li-

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visions of the preceding section,) shall be paid over to the co-executor or co-administrator, if there be any, or to whoever shall then be the rightful executor or administrator, and shall be assets in his hands, to be administered according to law." This, perhaps, requires a little elucidation; but it is fully explained by the commissioners, in their report, in the notes on *c.* 70. Generally, it is true, maladministration which constitutes a breach of the bond will disqualify the same administrator from holding his office and proceeding in the settlement of the estate. But as separate bonds may have been given, (Rev. Sts. *c.* 70, § 2,) there may be a co-executor or co-administrator not implicated, who may fitly take the assets and settle the estate. And it may be that the breach of the bond may be of such a nature as not to implicate the integrity of the executor, or his fitness to administer the estate, but on which a suit was brought to settle some question of right; in which case, if he will submit to the judgment, and charge himself with the amount, the purpose of the suit will be accomplished, and the assets may be again committed to him. But, in general, the refusal to account, the waste of the estate, or other maladministration, which constitutes the breach of the bond, and which will be disclosed in the suit, resulting in a judgment against the executor or administrator, on his bond, will show that he has become evidently unsuitable for the further discharge of the trust, and it will be the duty, as it is within the power, of the judge of probate, to remove him, and appoint an administrator *de bonis non*, and with the will annexed if it be the case of an executor removed. Rev. Sts. *c.* 63, § 7, and *c.* 68, § 25. Thus there must, in every case, be an administrator, duly qualified, and above exception, to take the proceeds of the judgment — either directly from the debtors, if paid voluntarily, or from the officer charged with the service of the execution — to be administered as assets.

Taken together, these provisions constitute a plain, practical and harmonious system, easy to be applied, in which each direction conforms to and harmonizes with every other. The judge of probate, who, as the obligee in the bond, is a

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necessary party, is yet an official and formal party only. He is in no case subject to costs. He can in no case receive the money himself, and in no case can he be required, or has he any authority, to direct the appropriation or distribution of the proceeds of such judgment. On the contrary, they are to be paid to a rightful administrator, and shall be assets in his hands, to be administered according to law. The law, then, directs the appropriation, and adapts it to every variety of claim which can exist. Creditors, legatees, next of kin, persons having derivative or conditional claims, under trusts or otherwise, will take these assets, under a due course of administration, according to their respective legal priorities, and in their due shares and proportions.

In this case, if it has not been already done, the judge of probate will probably think it expedient to remove the executors, and appoint an administrator *de bonis non*, with the will annexed, to whom the proceeds of this judgment will be committed. After the payment of debts, if any, and expenses, he will pay the residue to a trustee, to hold under the trusts expressed in the will, namely, to keep the amount at interest, on good security, to appropriate a portion of the income to the support of the mother, if living, and, subject to that appropriation, to pay over the amount, in equal shares, to the five nephews, as they have already, or may hereafter, respectively, come of age. If the trustee named is a suitable person, and will give satisfactory bonds, we see not why he may not be that trustee, according to the appointment of the testator. But if, as is more probable, he shall fail to give such bond, when required, or shall be incapable of discharging the trust, or evidently unsuitable therefor, in the judgment of the judge of probate, then, after due notice to the trustee and all others interested, he will remove him, and appoint another in his stead. Rev. Sts. *c.* 69, §§ 4, 7.

But the only entry now to be made will be substantially as follows, to be put into due form: That the plaintiff, the judge of probate, have judgment for the sum of three thousand dollars, the penalty of the bond, and that execution be awarded

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for said plaintiff, for part of said sum, to wit, for the sum of $, and costs of suit, taxed at $

The sum, for which execution is to issue, is that for which the executors are liable, and is to be ascertained by a hearing in chancery, if not already adjusted.

RICHARD E. NEWCOMB, Judge, &c. *vs.* WILLIAM STEBBINS & others.

A testator whose estate was insolvent, after giving to his wife certain real estate for life, and certain legacies to others, appointed W. his executor, to whom he made the following residuary devise and bequest: "I give to my son W., to hold to him and his heirs forever, all the rest and residue of my real and personal estate, subject to the following liens, payments and charges: *first*, the payment of all debts that I may owe at my decease, and all funeral charges, and the erection of a suitable monument at my grave; *second*, to pay to my three daughters, A., B. and C., each, and to D., wife of J. B., the sum of $70; the aforesaid liens and payments to be made, one half in two years and one half in three years from my decease, with interest from that event:" W. entered upon the real estate so devised to him, and occupied it two years, either in person, or by his lessees, and took notes from his lessees, for the rent, payable to himself, as executor. *Held*, that W. was not liable to account, as executor, for any part of said rents and profits.

DEBT on a probate bond executed by the defendants, December 20th 1842, upon the issuing of letters testamentary to William Stebbins, executor of the last will of Dennis Stebbins. The condition of the bond was such as is required by the Rev. Sts. *c.* 63, § 2; and the breaches thereof, assigned by the plaintiff, were the omission of said executor to return an inventory within three months, his omission to administer, according to law, all the property of the testator which had come to his possession or knowledge, and his omission to render a just and true account of his administration, within one year. The indorsement on the writ was thus; "This action is brought for the use and benefit of all creditors of, and all persons interested in, the estate of the said deceased, by leave and at the order of the judge of probate." The defendants were defaulted, and thereupon an auditor was

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appointed, by consent of the parties, to ascertain the sum for which execution should be awarded.

It appeared from the auditor's report, that said executor had represented the estate of his testator to be insolvent; that he procured the appointment of commissioners to examine the claims of creditors against the estate; and that said estate was insolvent.

The auditor found that the defendants were liable for the sum of $1946·58; that being the balance due from the executor, after charging him with $2596·34, the amount of the testator's personal property, and deducting various sums, amounting to $649·76, which the plaintiff's counsel admitted that the executor was entitled to deduct.

The auditor also submitted to the court the question whether the defendants were liable for an additional sum, received by the said executor, as rents and profits of the testator's real estate. The facts stated by the auditor, on this question, were as follows: The testator, by his will, after devising to his wife, for life, a certain part of his real estate, and to Lansford Stebbins, in fee, his real estate in Illinois, and giving certain legacies, made said William his residuary legatee and executor, in the following words: "I give and bequeath to my son William, to hold to him and his heirs forever, all the rest and residue of my real and personal estate, wheresoever situated, including therein all the real estate bequeathed to my wife, subject to the following liens, payments and charges: *First*, the payment of all debts I may owe at my decease, and all funeral charges, and the erection of a suitable monument at my grave; *second*, to pay to my three daughters, Louisa, Lucy and Mary, each, and to Maria, the wife of Josiah Brown of Hatfield, the sum of seventy dollars, provided he cancels a claim of nearly that amount, he holds against my son Lansford, which I gave encouragement to see paid; the aforesaid liens and payments to be made, one half in two years and one half in three years from my decease, with interest from that event. I hereby nominate and appoint my son William Stebbins, executor of this my last will and testa-

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ment." The said executor entered upon the real estate thus devised to him, and held it during the years 1843 and 1844, either personally or by his lessees; and the rents and profits were $554·29, viz. $242·60 for that part of the real estate occupied by him, during those two years, and $299·69 for that part of it held by his lessees. For the rents of the real estate occupied by his lessees, he took and now holds their notes made payable to him as executor.

Upon these facts, the auditor concluded his report thus: "If by law the said William Stebbins, as executor, is chargeable with said rents and profits, or any part of them, and the other defendants, as his sureties in the probate bond, are liable therefor in this action, then the said sum of $554·29, being the amount of the whole rents and profits of said real estate, or the sum of $242·60, the amount of the rents and profits of that part of the real estate which was occupied by the said William Stebbins, the executor, personally, is to be added to the said sum of $1946·58, as making the sum of the damages which I have assessed against the defendants, in this suit against them. H. G. Newcomb, Auditor."

Alvord, for the plaintiff.

Devens, for the defendants.

HUBBARD, J. The only matter in difference, in this case, relates to the rents and profits of certain real estate which William Stebbins received; and it is contended, in behalf of the creditors for whose benefit the action is prosecuted, that he received them in his capacity of executor, and, as such, is bound to account for them with the judge of probate. He claims to retain them as devisee under the residuary clause in his father's will.

It is argued for the plaintiff, that under this devise William Stebbins could take no estate, without first paying the debts of his father, and that such payment was a condition precedent; and, in support of this position, reliance is placed upon the cases of *Hays* v. *Jackson*, 6 Mass. 154, and *Gardner* v. *Gardner*, 3 Mason, 178. But we think these cases do not establish the position contended for. In *Hays* v. *Jackson*,

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according to the construction given to the will, the devise was, that after the payment of debts and legacies, the residue, whether real or personal, should go to the residuary legatee. The court held this not to be a specific devise, but the creation of a fund for the payment of debts and legacies — there being ample estate to pay the debts — with a devise of any remainder; that the residuary legatee could not claim contribution from the specific devisees, nor from the heirs at law, in respect to after acquired estate; and consequently, that if the estate devised to the residuary legatee was exchanged by the payment of debts and specific legacies, the devise would fail. In *Gardner* v. *Gardner*, there was a devise of certain specific real estate to the testator's son, and his heirs, the son paying all the testator's just debts out of said estate; and it was held that the debts were not a mere charge upon the devisee, but upon the land also, and that the devisee, taking the estate, might be reached by a court of equity, for the payment of debts, or that the executors might obtain leave to sell it; and that, in case of a sale by the devisee to a *bonâ fide* purchaser, the purchase money, if unpaid, might be followed. But it was held that the estate passed by force of the devise.

In the case at bar, the estate is not given after the payment of debts, like that of *Hays* v. *Jackson*, but it is the devise of the estate subject to certain charges; and these charges are not in the nature of a condition precedent, requiring the payment of the debts before the estate vests, but times are given for the payment. They accompany the devise, and the estate itself is to be applied to satisfy them, before other estates specifically devised can be so appropriated by the executor. It is a devise of the fee *cum onere*.

It is also argued that the executor is constituted a trustee for the creditors, and, as such, is responsible to them for rents and profits. How that may be, we are not called upon to express an opinion. But if that were the case, he would only be liable in equity, as a trustee, and could not be required, by the mere force of such liability, to account, as executor, for the rents and profits.

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It is said, however, that being responsible as trustee, it would avoid circuity of action to charge him as executor; but it is a sufficient answer to this suggestion, without mentioning others, to say that, by sustaining such a position, his bondsmen would be held accountable for rents and profits accruing after the decease of the testator, and for years perhaps; a responsibility not contemplated nor covered by the bond.

It is also contended that he is chargeable with these rents and profits, as executor, by force of the Rev. Sts. *c.* 67, § 6. But we think this section does not warrant the conclusion sought for. It is a reënactment of the provision in *St.* 1789, *c.* 11, § 1, with no material alteration; and that provision has never been held to make executors or administrators liable for rents and profits which came into their hands in consequence of their use and occupation of the real estate. It was rather designed to facilitate the settlement between the executors and the devisees, or the administrators and the heirs, where they had received rents and profits, so as to prevent disputes among them; and also in cases where the personal estate not proving sufficient to pay the debts, and the heirs being unwilling to have the real estate sold, might wish the executor or administrator to collect and apply the rents and profits for that purpose. See *Stearns* v. *Stearns*, 1 Pick. 157.

In point of fact, it often happens that executors, from their relation to the testator, come into the possession of the real estate; but in such cases, they are responsible to the heirs or devisees for the rents and issues, and not to the creditors. In the case of *Hays* v. *Jackson*, before cited, the court say, "in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at." See also *Drinkwater* v. *Drinkwater*, 4 Mass. 358. In the case of *Gibson* v. *Farley*, 16 Mass. 280, the court directly decided the point, that the heirs of a deceased insolvent debtor are entitled to the rents and profits of his real estate, until it is sold for the payment of debts. The case was argued at length, by

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able counsel, and was thoroughly considered by the court, and has constituted a leading case from that time. And it stands upon reason and authority, that the claim of the creditor is but a lien; and the rents and profits have ever been held as incident to the reversion. The same view is also there taken of § 1 of St. 1789, c. 11, which, we think, is the sound construction. In the State of Maine, also, where this section was re-enacted in *totidem verbis*, the court have construed it in the same manner, and maintain the doctrine established in *Gibson* v. *Farley*. See 1 Smith's Laws of Maine, 231, 267, & *notes*.

It has been argued by the counsel for the plaintiff, that the authority of *Gibson* v. *Farley* has been shaken by the subsequent cases of *Grout* v. *Hapgood*, 13 Pick. 159, and *Jennison* v. *Hapgood*, 14 Pick. 345. But those cases decide no more than this, that the executor or administrator is chargeable with the interest arising from the proceeds of real estate which has been sold for the payment of debts, and that such interest is assets for that purpose; of the correctness of which there can be no doubt. But this does not affect the decision in *Gibson* v. *Farley*. See also *Heald* v. *Heald*, 5 Greenl. 387. *Fuller* v. *Young*, 1 Fairf. 365. *Spring* v. *Parkman*, 3 Fairf. 127. Nor do we mean here to touch the case of a party entering upon lands immediately after the decease of the owner, and cutting and carrying off wood, and thus lessening the value of the estate, before an order of sale for the payment of debts can be obtained.

It was also said, in argument, that the case of *Gibson* v. *Farley* related to an intestate estate, and that there is a distinction between heirs and devisees. But we think no distinction, as applicable to this case, exists; for the devisee is *hæres factus*, and may enter, upon the death of the testator, before probate of the will.

The defendant Stebbins stood in three relations to the estate; that of one of the heirs at law, a devisee, and executor of the testator. And in respect to these different relations, when the heir at law is also made the devisee of the estate, and he enters, he will be presumed to have entered as heir,

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it being the higher estate and most for his advantage; and so a devisee, who is not an heir, or not sole heir, when he enters, (and his right of entry is immediate, Co. Lit. 111 *a*,) shall be presumed to have entered as devisee, as being for his advantage, and not for the mere benefit of creditors; and as an executor or administrator has no right of entry, the statute gives none, except after license to sell for the payment of debts. Rev. Sts. *c.* 71, § 11. In this case, Stebbins was in as devisee, taking the rents and profits as such; and till a sale, he is not called upon to account for them; they not being a part of the estate of the deceased.

It was argued, however, that he is accountable for that part of the rents received from lessees, because he received payment therefor in notes payable to himself as executor, and it ought, therefore, to be held that he entered and received the rents and profits as executor, and has thus made himself accountable to the creditors. But the mere taking notes as executor does not bind either heirs or creditors; and he cannot then be estopped from showing in what capacity he held the estate, as estoppels are mutual, and a mere mistake of his rights shall not bind him; he not having brought the rents and the notes into his account and made them the subjects of a decree of the court of probate. It is still matter *in pais*, and he may show a mistake on his part in thus taking the notes; as the heirs or creditors could correct mistakes and surcharge his account where he had omitted to make proper charges against himself. The Rev Sts. *c.* 70, § 10, clause 4, which has been cited, applies to assets in the hands of an executor or administrator, but it does not touch the question what are assets.

We are therefore of opinion, that the rents and profits were not assets in the defendant Stebbins's hands as executor, and that he is not bound to render them in his probate account. Judgment is to be rendered for the penalty of the bond, and execution to issue for the balance of the account, less the rents and profits, as stated in the auditor's report.

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Thomas R. M'Gee *vs.* Asa A. Prouty & another.

When a promissory note, that has been negotiated, comes into the possession of one of the parties liable to pay it, such possession is *primâ facie* evidence of payment by him, and he is to be treated as the *bonâ fide* holder, unless the contrary is made to appear.

A., B., C. and D. signed a promissory note, and the word "surety" was added to the names of C. and D. only: D. paid the note, and sued A. and B. jointly, to recover the amount paid by him. *Held*, that B. might prove, by parol evidence, that he signed the note as surety for A.; and that, upon such proof, D. could not maintain such joint action, although D., when he signed the note, did not know that B. was surety for A.

This was an action of assumpsit, on the money counts, against Asa A. Prouty and William Bell. The plaintiff, at the trial in the court of common pleas, before *Cushing* J. offered in evidence the following promissory note: "April 25th 1843. Sixty days from date, for value received, we jointly and severally promise the president, directors, and company of the Greenfield Bank, to pay them, or order, fifty dollars at their banking house

Asa A. Prouty.
William Bell.
Eph'm H. Thompson, surety.
Thomas R. M'Gee, surety."

Ephraim H. Thompson was called as a witness, by the plaintiff, and testified that he knew the signatures of Prouty and Bell; that he first offered the note at the bank, with the names of Prouty and Bell only; that the bank declined taking the note without further security; that he offered the note a second time, after the other two had signed it; that he and M'Gee signed it at the bank; that after the note was discounted, Bell knew of it; that he (the witness) saw Prouty before the note was offered the second time, and Prouty told him to sign the note himself, and get M'Gee to sign it; that he saw Bell afterwards, at Colerain, and told him that he (the witness) did not get the money on the note with Bell's and Prouty's names alone, and that he and M'Gee had signed it; and that Bell said, "it is all right."

On cross-examination, this witness said, it was a week or more after the money was got, that he saw Bell and told him as before stated; that he got M'Gee to sign the note, at the

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request of Prouty alone; that M'Gee had the money, and that the witness paid it to him on being called upon by him to pay a debt which the witness owed him; that Prouty owed the witness a debt of about $100, and that this note was taken in part payment of that debt; that he told M'Gee that Prouty so owed him, and that he would get the money of Prouty, or a bank note; that it was very likely he told M'Gee what the consideration of the note was; that when the witness called on Prouty, Prouty said he had not the money, but he would get a bank note, and get Bell to sign it; and that, about the time the note became due and payable, the witness saw Bell, and he said he was willing to pay his share, a third or a fourth of it. So much of this testimony as tended to show that Bell was a surety, was admitted by the court, under objections from the plaintiff.

The plaintiff contended, *first*, that the possession of the note by the plaintiff was *primâ facie* evidence that he had paid it and taken it up, and conclusive unless rebutted; and *secondly*, that the terms and effect of a written contract cannot be varied, altered or controlled by parol testimony, and that it, therefore, could not be shown, by such testimony, that Bell was a surety only.

The jury were instructed, "that the first question for them to decide was, whether the plaintiff had paid the money due on the note; and that, although no direct evidence of payment had been given, yet the possession of the note was a circumstance from which it was competent for the jury to infer that the note was paid by him: That if the jury should be satisfied that the plaintiff paid the amount of the note, the next question was, whether this payment was made for and on account of the defendants, Prouty and Bell; that if they were the principal promisors, and M'Gee and Thompson merely sureties, then the payment was made for their benefit, and the plaintiff would be entitled to recover; but if Prouty was the principal, and Bell only a surety, then, although they might be liable separately — the one, as principal, for the whole, and the other, as surety, for contribution of his share — yet they

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would not be liable jointly, as they were sued in this action: That the body of the note contained no evidence of the relation of these parties to one another, nothing showing which of them were to be regarded as principals, and which of them as sureties; and that the only evidence appearing on the note, as to this matter, was the word 'surety' written against the names M'Gee and Thompson: That it was competent for the defendants to show, by parol testimony, notwithstanding the signatures of M'Gee and Thompson alone had the word 'surety' written against them, that Bell was also a surety; and that, if the jury should be satisfied that Bell was a mere surety, then he would not be liable jointly with Prouty, unless it should also appear to the jury that M'Gee became party to the note at the request of Bell."

The plaintiff then moved the court to instruct the jury, that though it might appear that Bell was a surety as respected Prouty, yet, unless knowledge of that fact should be brought home to M'Gee, Bell would still be liable as principal, as to him; and that, though Bell might have been merely a surety of Prouty, as between him and Bell, yet if he intended to be liable as principal, so far as Thompson and M'Gee were concerned, he would still be liable in this action. But the court declined so to instruct the jury.

A verdict was returned for the defendants, and the plaintiff alleged exceptions.

Alvord, for the plaintiff. The plaintiff's possession of the note was *primâ facie* evidence, and conclusive until rebutted, that he paid it; and the jury should have been so instructed. *Northampton Bank* v. *Pepoon*, 11 Mass. 288. *Baring* v *Clark*, 19 Pick. 220. *Dugan* v. *United States*, 3 Wheat 172. *Green* v. *Jackson*, 3 Shepley, 136. Greenl. on Ev. § 33. Story on Notes, §§ 247, 452.

There is a difference between cases in which no one is designated as surety on a note, and where part of the signers are so designated. In the latter case, parol evidence is not admissible to show that any are sureties besides those who are so designated. When one signs, without describing himself

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as surety, he is to be held as principal by all parties who have no notice that he is surety. *Non constat* that the present plaintiff had notice that Bell was surety. See *Grafton Bank* v. *Kent*, 4 N. Hamp. 224. *Harris* v. *Brooks*, 21 Pick. 195.

The last instruction requested by the plaintiff should have been given to the jury. *Warner* v. *Hall*, 5 Verm. 156.

Aiken, for the defendants. The first instruction given by the judge was sufficiently favorable to the plaintiff. The production of the note by the plaintiff could not be regarded as *primâ facie* evidence, conclusive till rebutted, that he had paid the note, because he might have called the cashier of the bank to prove that fact.

The case of *Warner* v. *Rice*, 3 Wend. 397, shows that there is no distinction, as to the admission of parol proof that a promisor is surety, between cases where a part of the signers are designated as sureties, and cases where there is no such designation. See *Taylor* v. *Savage*, 12 Mass. 102. *Harris* v. *Brooks*, 21 Pick. 195. *Grafton Bank* v. *Kent*, 4 N. Hamp. 221.

There never was any contract between the plaintiff and Bell, who was a mere surety for Prouty. Bell did not know that the other parties had signed the note, until after it was discounted. Whatever claim the plaintiff may have upon Prouty, he cannot maintain this action against him and Bell jointly. *Lapham* v. *Barnes*, 2 Verm. 213. 3 Wend *ubi sup.* Bayley on Bills, (2d Amer. ed.) 45, 50.

The last instruction which the plaintiff requested was rightly refused. The judge had instructed the jury fully, and no further instructions were necessary.

HUBBARD, J. Several points were made by the plaintiff, in the trial of this cause in the court of common pleas, upon which the plaintiff requested the ruling of the judge. 1. The first was, that the possession and production of the note by the plaintiff, was *primâ facie* evidence that he had paid and taken it up, and was conclusive unless rebutted. The presiding judge ruled that the possession of the note was a circumstance from which it was competent for the jury to infer that the note was paid by him.

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We have no doubt that where a promissory note has been negotiated, and afterwards comes into possession of one of the parties liable to pay it, such possession is *primâ facie* evidence of payment, and that he is to be treated as the *bonâ fide* holder, unless the contrary is made to appear. *Dugan* v. *United States*, 3 Wheat. 172. *Baring* v. *Clark*, 19 Pick. 220. *Northampton Bank* v. *Pepoon*, 11 Mass. 288. The ruling of the judge was not so pointed; but it was clearly to that effect, and, upon the evidence, was sufficiently favorable. For though possession is *primâ facie* evidence of payment, it does not follow, as a consequence from the possession, that M'Gee paid it; because it might have been more for the interest of Thompson, if he, and not the plaintiff, had paid the note, to sue in the plaintiff's name, rather than in his own, in the belief that the plaintiff might recover against Bell, when he could not. But however this may be, the case does not depend upon the ruling on this point.

2. The plaintiff contended, that the terms and effect of a written contract cannot be varied, altered or controlled by parol testimony, and therefore it could not be shown by parol that Bell was a surety only. But the presiding judge ruled that it was competent to show it by parol testimony.

The principle of law, in respect to the exclusion of parol testimony in the construction of written contracts, is perfectly settled; but it is not applicable to this case. The attempt to apply it arises from a mistaken view of the relations and rights of the respective parties. The law respecting sureties, and their obligations to contribute proportionably, does not arise out of contract between them, but is founded on principles of equity; and the obligation is enforced, as a legal liability growing out of the mutual relation. As between these parties, therefore, Bell, when sued, might show that he was only a surety, as the maker of a note may show, as between himself and the payee, that he signed it for the accommodation of the payee. *Grafton Bank* v. *Kent*, 4 N. Hamp. 221. *Warner* v. *Rice*, 3 Wend. 397.

This suit is not on the note; that is only a part of the

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evidence in the case, offered by the plaintiff, and is not conclusive upon Bell.

3. The plaintiff also requested the court to instruct the jury, that though it might appear that Bell was a surety as respected Prouty, yet unless knowledge of that fact should be brought home to the plaintiff, Bell would still be liable, as principal, as to him; and that though Bell might have been merely a surety of Prouty, as between him and Bell, yet if he intended to be liable as principal, so far as Thompson and M'Gee were concerned, he would still be liable in this action. But the court declined instructing the jury as requested.

It is true that Bell did not add the word "surety" to his name, and he might therefore be liable to a *bonâ fide* holder of the note, without notice, to all the responsibilities of a principal. But as between the sureties themselves, we are of opinion that he may prove that he was merely a surety. A want of knowledge of the fact, on the part of the plaintiff, does not alter his relation to Bell. They are still sureties; and because the plaintiff has taken up the note, it does not change his character as a co-surety. 4 N. Hamp. *ubi sup.* *Taylor* v. *Savage*, 12 Mass. 102. *Harris* v. *Brooks*, 21 Pick. 195. *Lapham* v. *Barnes*, 2 Verm. 213.

As to the latter part of the prayer, it does not appear what the instruction was; but upon the evidence, as reported, no such intention was proved. On the contrary, it did not appear that Bell knew that M'Gee had put his name to the note, till after it was discounted. The want of instruction, therefore, became immaterial, so far as we can now judge.

It is not necessary for us to consider whether Bell would be liable to M'Gee, in a separate action, under the facts disclosed, for the whole or any part of the money now demanded. It is very clear that he is not liable jointly with Prouty, and therefore is not chargeable in this action.

Exceptions overruled.

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Abel Babcock *vs.* The Western Rail Road Corporation.

A. granted to the Western Rail Road Corporation full and free license and authority to locate, construct, repair and forever maintain and use a rail road, upon, through and over his land, and to take his land therefor, to the extent authorized by their charter. The land was so situated that the embankment of the rail road would cause water to accumulate on the upper side thereof, and it became necessary to provide for the passage of water to the lower side: The corporation therefore made culverts, in suitable places, and in a convenient manner; but the situation of the land was such that it was necessary to connect ditches with the culverts, and extend the ditches, beyond the line of the location of the rail road, into the land of A., in order to prevent the water from setting back so as materially to injure the rail road or damage the land of A. *Held*, that the corporation were authorized by said license so to make said culverts and ditches, under the rule of law, that a grant of a thing includes the means necessary to attain it. *Held also*, that the corporation were authorized, by said license, to deepen and widen, in the land of A., beyond the line of the location of the rail road, the bed of a mountain stream, over which the rail road was laid out and constructed, to facilitate the discharge of the waters of the stream; such deepening and widening being necessary to secure the rail road from damage, or to prevent the land of A. from being broken and washed away. *It seems*, also, that the corporation had authority to do the aforesaid acts, under their charter and the Rev. Sts. c. 39.

Trespass for breaking and entering the plaintiff's closes in Chester, lying on each side of the defendants' rail road, and there cutting ditches, &c., and piling earth and stones on the plaintiff's soil adjacent to the track of said road. Trial before the chief justice, who made the following report thereof:

After the plaintiff's evidence was introduced, the defendants gave evidence tending to show that the land was so situated that the embankment for the rail road would cause the water to increase on one side, and that culverts were laid under the road, in three places, to carry it off. The jury were instructed, that if the land was so situated that some expedient was necessary to provide for the passage of the water from the upper to the lower side, and these culverts were laid in suitable places, and in a convenient manner, the defendants had authority so to make them; and further, that if it was necessary to connect drains or ditches with these culverts, and if, by terminating them at the limits of the location of the rail road, the water would naturally dam up, or set back, so as materially to injure the rail road, or damage the land of the adjacent owner; and if it was necessary to extend such ditches

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beyond those limits, to avoid these consequences, the defendants were authorized so to extend them into the land of the adjacent proprietor.

There was evidence tending to show that the rail road crossed a mountain torrent, near its outlet into a river; that the water frequently rushed down this stream with great violence, and in great quantity; that the defendants had removed rocks, and deepened and widened the bed of the torrent, below the track of the rail road, to facilitate the discharge of the stream into the river. There was some conflict of evidence, on the question whether the bed of the torrent, thus deepened and widened, extended beyond the limits of the location of the rail road, into the plaintiff's land; but the evidence tended to show that it did. Whereupon the jury were instructed, that if it was necessary to widen and deepen the bed of this mountain stream, in order to facilitate the discharge of its waters into the river, and if this was necessary, to secure the rail road from damage or to prevent the land of the adjacent proprietor from being broken and washed away, then the defendants had authority so to deepen and widen the bed of the stream, beyond the limits of the location of the rail road. The jury were instructed that the defendants had this authority, either under their act of incorporation, (*St.* 1833, *c.* 116,) or under an agreement entered into between them and the plaintiff, which was given in evidence by the defendants, dated October 20th 1836, and by which the plaintiff, for the consideration therein mentioned, under his hand and seal, did "grant, assign, transfer and convey to said rail road corporation, and for the use thereof, and their successors and assigns, full and free license and authority to locate, construct, repair, and forever maintain and use the said rail road, upon, through and over my said lands, in such places and courses as the said corporation may judge necessary and convenient, and to take therefor my lands, to the extent authorized by their charter," &c. (See 6 Met. 347.)

The jury were further instructed, that the defendants had no right to enter upon the plaintiff's lands adjacent to the rail

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road, for the purpose of obtaining materials, or piling up and depositing waste earth or stones, without a license from the plaintiff.

To the foregoing instructions, except the last, the plaintiff excepted; and a verdict being returned for the defendants, the plaintiff moved that it should be set aside, and a new trial be granted. This motion was reserved for the consideration of the whole court.

W. G. Bates & Davis, for the plaintiff.

R. A. Chapman, for the defendants.

Shaw, C. J. Upon a review of the directions given to the jury, the court are of opinion that they were correct. They are founded on the obvious distinction between that which is necessarily incident to the prosecution of the work, and that which would only be convenient. Com. Dig. Grant, E. 11. Water can be drained off only in a particular direction, and by one method; that is, by making a drain from the place where it accumulates to a lower level. It is a general rule, we think, that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object. The court are therefore strongly inclined to the opinion, that under the act of incorporation, passed March 15th 1833, (*St.* 1833, *c.* 116,) and the general laws respecting the establishing of rail roads, the corporation had the authority in question, independently of the plaintiff's deed. Rev. Sts. *c.* 39, §§ 45, 54, 56. Upon this principle, it has been decided that all persons — not merely those whose land is taken for laying the road, and for supplying materials, under §§ 54, 55, but, by § 56, all persons who may sustain damage occasioned by laying out, making or maintaining their road — shall have a remedy against the corporation. *Dodge* v. *County Commissioners*, 3 Met. 380. *Ashby* v. *Eastern Rail Road*, 5 Met. 371. The only ground on which such damages could be allowed is, that they are authorized, because they are the natural and necessary consequence of the acts authorized to be done. But this must be

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confined to that which is strictly necessary to accomplish the enterprise. When it is necessary to *take lands* of a greater width than five rods, for embankments, deep cuts, or the supply of materials, a license from the county commissioners is necessary. But such a taking ordinarily unfits the land for the uses of the owner, and is in its nature an appropriation; but we cannot consider that laying a drain through or under land, to draw off water, is such taking or appropriation, or requires such license.

But whatever might have been the rights of the corporation, by their act of incorporation and the laws limiting and defining the powers and duties of rail road companies, the court are of opinion, that the power exercised by the defendants was granted by the plaintiff's own deed. It is a well known and reasonable rule, in construing a grant, that when any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also. *Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.* By the grant of a ground is granted a way to it. Shep. Touch. 89. The plaintiff, by his deed executed before the acts done, and before the location of the road, granted to the corporation, their successors and assigns, full and free license and authority to locate, construct, repair, and forever maintain and use the said rail road, upon, through and over his said lands, &c. If the laying of the drains or ditches in question, through the plaintiff's land, or the deepening of the bed of the mountain torrent, in his land, *extra viam*, beyond the limits of the five rods, was necessary to the construction, or to the maintenance of the rail road, the authority so to do was granted by this deed, and the direction to the jury, to that effect, was right.

Judgment on the verdict for the defendants.

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Roderick Lumbard & another *vs.* Lauren Trask.

By *St.* 1809, c. 86, trustees of the school funds in the town of Springfield were incorporated, with authority to sell and convey such lands as the town had directed, or should thereafter direct, to be sold for the use of schools: The town, in 1810, passed a vote, that said trustees be authorized to sell such parts of the land belonging to the town as the selectmen should, by writing, certify that it would be for the interest of the town to sell. *Held*, that future boards of selectmen, as well as the selectmen chosen for the year 1810, were intended by this vote.

Writ of entry to recover a small tract of land in Springfield, "being part of the old road, as laid out and accepted by the court of general sessions of the peace, holden at Springfield, in August 1760, leading from Springfield to Longmeadow, on the south side of Mill River," &c.

At the trial before the chief justice, the demandants gave in evidence a deed of the demanded premises, made to them, on the 9th of April 1844, by the trustees of the school funds in the town of Springfield. They then proceeded to offer the following evidence to prove, either title in themselves, or an authority in said trustees to convey the title of said town: 1. The act incorporating said trustees, passed on the 3d of March, 1810. (*St.* 1809, *c.* 86.) 2. A vote of the town of Springfield, passed on the 21st of November 1809, accepting the report of a committee recommending an application to the legislature for an act to incorporate trustees of school funds. 3. A vote of the town, passed on the 8th of May 1810, "that the trustees of the school funds in said town" (who had been recently incorporated) "be authorized and empowered to sell such parts of the land belonging to said town as the selectmen shall and may, by writing under the hand of the major part of them, certify that it will be for the interest of said town to sell and dispose of." 4. Records of the trustees of the school funds, showing an organization under their act of incorporation, their election of officers, and the following votes of said trustees: "September 30th 1843. Voted, that the committee on lands be authorized to sell a strip of land on the west side of the old road leading across Mill River, near L. Trask's shop, to Roderick Lumbard, and to sell the residue

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of the land owned by the town, at their discretion, at auction." "May 25th 1844. Voted, that the president be authorized and empowered to execute and deliver confirmatory deeds to those persons to whom deeds of land have heretofore been made by the trustees, or the president of the trustees, if the purchasers request it, and that all sales heretofore made by the trustees be hereby confirmed. Voted, that the certificate of the selectmen of the town of Springfield, bearing date April 29th 1844, authorizing and confirming the sale of lands, be entered upon record. Voted, that the president be authorized to execute a deed of conveyance, and give seizin upon the premises, to James Brewer and Roderick Lumbard," (the present demandants,) "or either of them, of a tract of land on the southerly side of Mill River, and westerly of Trask's furnace, or any lands which the trustees shall convey, lying in the vicinity thereof, to any person or persons."

To show that the trustees were duly authorized by certificate of selectmen, made pursuant to the aforesaid vote of the town, passed May 8th 1810, the demandants offered the abovementioned certificate of selectmen, as follows: "We the subscribers, selectmen of the town of Springfield, hereby certify that it is expedient for the interests of the town, that the trustees of the school funds in the town of Springfield shall sell all such lands, belonging to the town, as have been used for roads and public highways, and which heretofore have been discontinued; that said trustees may hereafter, from time to time, sell all such lands, where the roads and public highways over them shall have been discontinued; and that the selectmen approve and ratify all such sales as have heretofore been made, by said trustees, of lands over which roads have been laid, which were discontinued at the time of such sales. Springfield, April 29th 1844." (Signed by the selectmen.)

It was objected by the tenant, that by the vote of the town, of May 8th 1810, authorizing the trustees to sell such lands as the selectmen should certify that it would be for the interest of the town to sell, the power of certifying was lim-

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ited to the selectmen then in office, and that the vote did not authorize future boards of selectmen, for an unlimited time; and it was contended, that as the authority had not been renewed, the certificate of the selectmen of 1844 was not within the authority conferred by the town, and vested no authority in the trustees to sell. This objection was sustained by the judge.

A nonsuit was thereupon entered, to be taken off, and a new trial to be granted, if the decision of the judge was wrong.

W. G. Bates & H. Morris, for the demandants. The *St.* of 1809, *c.* 86, § 2, enacts "that such of the lands belonging to the town of Springfield as the said town has already directed, or may hereafter direct, to be sold for the use of schools in said town, or shall authorize the said trustees to hold or dispose of, and also the proceeds of any sale of lands appropriated by said town for the use of schools, be, and they hereby are vested in said trustees, and their successors, and the said trustees are hereby authorized and empowered to sell and convey the whole or any part of such lands, and to execute deeds thereof," &c. By this *St.* a permanent body was incorporated; and the town's vote of May 8th 1810 must have been passed with reference to the character of that body, and for the purpose of establishing a permanent mode of directing what lands should thereafter be sold. The selectmen then in office were not named; and therefore an official and not a personal authority was conferred, which extended to future boards of selectmen. The power of certifying to the trustees should continue as long as the power of the trustees to sell. See 4 Kent Com. (3d ed.) 320. *Jackson* v. *Ferris*, 15 Johns. 348. *Farwell* v. *Jacobs*, 4 Mass. 634.

R. A. Chapman & Ashmun, for the tenant. This case depends wholly on general principles applied to powers conferred, and no adjudications directly bear upon it. The main thing to be regarded is the *St.* of 1809, *c.* 86; for the trustees thereby incorporated can proceed only in the manner therein authorized. The lands did not vest in the trustees; and therefore they could not convey them as their own. By § 2

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of said statute, the deeds which they were authorized to execute are declared to "be good and effectual in law to pass and convey *all the right of said town* in and to said land."

The town's vote of May 8th 1810 did not confer a continuing power on successive selectmen. The power of selectmen is a naked one, and nothing is to be claimed on their own account. The duty required of them, in this instance, was one of discretion; and this furnishes a strong presumption that the persons then in office were alone intended by the vote.

Dewey, J. The legislature having, upon the petition of the inhabitants of the town of Springfield, enacted the St. of 1809, *c.* 86, authorizing the raising of a fund for the support of public schools in that town, the town took immediate measures to carry into effect the object of the statute, and by a vote passed on the 8th of May 1810, authorized the trustees of the school fund to sell such land, belonging to the town, "as the selectmen shall, by writing under the hand of the major part of them, certify that it will be for the interest of said town to sell." There can be no doubt but that it was competent for the town to authorize the conveyance of the lands, in the manner indicated by this vote; and the only question is as to the extent of the authority conferred on the selectmen by the terms of the vote; whether it be an authority limited in point of time, extending only to the period of the tenure of office of the selectmen for the then current year, or was applicable to future boards of selectmen.

In looking at the act incorporating the trustees of the school funds, (*St.* 1809, *c.* 86,) we perceive at once that the purpose was, to create a permanent body of responsible men to manage a school fund, and that such fund was to consist, in part, of the proceeds of town lands appropriated to that object by the town. The trustees of the school funds were constituted a permanent board, with the power of filling their own vacancies, and not dependent upon annual elections. In searching for the true intent of the town, in the vote under consideration, and whether it was intended as a continuing power to

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sell, the fact we have alluded to of the permanency of the office of the trustees who were constituted agents to sell, under the approval of the selectmen, is entitled to some weight. The general agents intrusted with the sale of the lands, being members of a permanent body, we may the more readily assume that provision would be made for a supervising body that might act for a more extended period than that for which municipal officers are elected. Looking at the vote itself, we find no limitation, in terms, to the then present year, or the then existing board of selectmen. The authority to act in this matter was clearly delegated to the selectmen, as such, and solely in reference to their official capacity. Those holding the office in future years would be alike chosen by the inhabitants of the town, and would equally represent the interests of the town, and would be presumed to be equally discreet and judicious. The board which was selected for this purpose strongly confirms the view, that there was no limitation to any particular year. The terms of the vote may well embrace future boards; and the general object and purposes of the vote being better effectuated by such construction, we are of opinion that the power to sell under the sanction of the selectmen, conferred by the vote of the town, was not limited to the period of the continuance in office of the then present selectmen, but was intended to be a continuing power, and to apply to the successive boards of selectmen that might be in office; and that the vote of the town of May 1810, being in full force and unrevoked, the trustees of the school funds were authorized, in the year 1844, to sell such part of the lands belonging to the town as the selectmen for that year should certify would be for the interest of the town to sell.

New trial ordered.

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Amasa B. Benson *vs.* The Monson and Brimfield Manufacturing Company.

A corporation is not liable to the penalty imposed, by *St.* 1842, *c.* 60, § 3, on the owner, agent or superintendent of a manufacturing establishment, for employing children under the age of twelve years, in laboring more than ten hours in a day in such establishment.

This was an action of debt on *St.* 1842, *c.* 60, § 4, by which it is enacted, that "the owner, agent or superintendent of any manufacturing establishment, who shall knowingly employ any child under the age of twelve years in such establishment, contrary to the provisions of the third section of this act," (i. e. more than ten hours in any one day,) "shall forfeit the sum of fifty dollars for each offence, to be recovered in any court of this Commonwealth, competent to try the same, to the use of the person prosecuting." The defendants were an incorporated company.

At the trial in the court of common pleas, before *Merrick*, J. the plaintiff introduced evidence tending to prove that the children named in his writ, on the days therein stated, were employed in laboring in the defendants' manufacturing establishment, more than ten hours in each of those days; that they were under twelve years of age; and that their ages and their employment, as aforesaid, were known, at the time, to the overseer whom the defendants had employed to take charge of their said establishment. The defendants' counsel objected, that the plaintiff's evidence was not sufficient to sustain this action, and that they were not liable to the penalty imposed by the statute, for the act of their overseer. These objections were overruled, and the jury were instructed, that if they believed the plaintiff's evidence, their verdict should be in his favor. The jury found a verdict for the plaintiff, and the defendants alleged exceptions.

R. A. Chapman, for the defendants.

H. Morris, for the plaintiff.

Dewey, J. The provisions of acts imposing penalties are

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not to be extended, by construction, beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not, in terms, included in the statute on which this action is brought. They may be said to be embraced in the word "owner" of any manufacturing establishment; and if the provision had been thus limited, and no penalty imposed on other persons than the owners of the establishment, it would perhaps have been a reasonable construction, and necessary to give force and effect to the statute, to the extent designed, to have held the corporation liable to the penalty under the description of "owner." But ample provision is made to reach the cases of corporations managing their establishments through agents or superintendents. The agents or superintendents of manufacturing establishments are, by the express terms of the statute, liable to its penalties. Thus every case may be reached, without applying the penalties to corporate bodies, and sustaining actions against them, in their corporate name, for breach of this statute. The penalty may thus also be enforced with greater facility, as the offence consists in knowingly employing children under the age of twelve years, contrary to the provisions of the act. The fact of such knowledge could not, in ordinary cases, be brought home to the corporation, as such, though it might be shown to exist with reference to the agent or superintendent.

New trial granted.

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Joseph J. West & another *vs.* Caleb Rice.

The cause of action against a sheriff, for the taking of insufficient bail by his deputy, accrues on the return of *non est inventus* upon the execution against the principal; and the statute of limitations begins to run from that time.

A deputy sheriff arrested a debtor on a writ, and took an instrument in the form of a bail bond, except that it was not under seal, signed by said debtor and one surety only, and returned that he had held the debtor to bail: He did not return said instrument with the writ, but filed it in the clerk's office, several months afterwards: The debtor absconded, and the execution which issued against him, was returned *non est inventus*: The creditor, having failed to recover of the bail, brought an action against the sheriff, for the default of the deputy in not taking sufficient bail. *Held*, that the measure of the plaintiff's damages was the sum that he had lost by the misdoings of the deputy, viz. the sum which the plaintiff would have obtained, if sufficient bail had been taken; that this sum, *primâ facie*, was the amount of the plaintiff's judgment against the debtor; but that evidence of the debtor's inability to satisfy that judgment was admissible in reduction of damages. *Held also*, that evidence as to the debtor's property and business, a year or two after the plaintiff's execution against him was returned, was competent to be considered by the jury, with reference to the reduction of damages against the sheriff.

This was an action of trespass upon the case against the sheriff of Hampden, commenced on the 29th of April 1842, for the default of Israel M. Parsons, his deputy, in not taking sufficient bail on a writ sued out by the plaintiffs against Henry W. Hatch and James S. Hatch, on the 2d of October 1837, and returnable to the court of common pleas on the third Monday of February 1838.

At the trial of the present action, in the court of common pleas, before *Washburn*, J. the plaintiffs put into the case their said writ against H. W. and J. S. Hatch, on which said deputy had made a return, that he had arrested the said H. W. Hatch, and held him to bail. The plaintiffs also showed that their said writ was duly entered, and that they recovered judgment against said H. W. and J. S. Hatch, at October term 1838, for $822·30 damages, and $17·81 costs of suit; that execution issued on said judgment, October 22d 1838, and was delivered to said deputy, who made the following return thereon, in February 1839: "I have made diligent search for the property and body of said Henry W. Hatch and James S. Hatch, and could find neither. I therefore return said execution unsatisfied. I. M. Parsons, deputy sheriff."

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It appeared that, when said Parsons served the plaintiffs' original writ, Henry W. Hatch made an instrument in the form of a bail bond, except that it was without seals, signed by himself, and by Delano Bartlett as his surety; that said instrument was not returned with the original writ, but was filed in the clerk's office on the 6th of July 1838; that after the return of said execution, viz. on the 16th of May 1839, the plaintiffs sued out a writ of *scire facias* against said Bartlett, as upon a valid bail bond, on which they recovered judgment for the full amount of the sum recovered in the original suit, and interest, and took out execution thereon, and committed said Bartlett to jail. It also appeared that Bartlett was afterwards released from jail; and the plaintiffs introduced evidence tending to show that Bartlett's said commitment and discharge were not directed nor known by their attorney, who brought the original action, and that they were residents in New York.

It further appeared that said Henry W. Hatch, immediately after the service of the plaintiffs' original writ upon him, left the Commonwealth and went to Alabama, where he has ever since resided. And the defendant offered to introduce evidence, for the purpose of reducing the plaintiffs' damages, that said Hatch, at the time of said service, was insolvent, and had been ever since. This evidence, though objected to by the plaintiffs, was ruled to be admissible. The defendant thereupon called said James S. Hatch as a witness, who testified that he visited his brother, said Henry W. Hatch, in Alabama, in 1839, and remained there till March 1840; that his object in going to Alabama was to obtain funds from his said brother, to meet his own liabilities for the partnership between himself and his brother, who was the active partner; that when said partnership was formed, viz. in 1836, his said brother had very little property; that a quantity of goods was then purchased by him, to be carried to Alabama for sale; that in 1837, at the time of the service of the plaintiffs' original writ, his brother showed him notes against persons in Alabama; and that when he was in Alabama, as before mentioned, his brother showed him some of the same notes. He also testified as to the prop-

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erty which his said brother had in possession, in January and February 1840, and the mode of his then doing business, and of the ineffectual efforts of the witness to obtain any funds from him.

The plaintiffs thereupon objected furthermore, that this evidence was incompetent, so far as it related to the state of Henry W. Hatch's property and condition in January and February 1840. But it was ruled that this evidence was competent for the consideration of the jury.

The defendant objected to the plaintiffs' recovery, on the ground that this action was barred by the statute of limitations, (Rev. Sts. *c.* 120, § 3;) more than four years having elapsed, after the service of their said original writ, before they commenced this action. This objection was overruled.

The jury were instructed "that the plaintiffs were entitled to recover, if at all, whatever amount they had lost by means of the misdoings of the defendant's deputy; that, *primâ facie*, the amount of the judgment lost would be the measure of the plaintiffs' damages; that it was competent for the jury to inquire what the plaintiffs would have realized, towards the satisfaction of their debt, if sufficient bail had been taken, and that if the jury were reasonably satisfied, from the evidence, that the plaintiffs would thereby have realized their whole debt and costs, they were entitled to a verdict for that amount and interest; otherwise, for such part only as the jury believed they would have realized, if such bail had been taken."

The jury returned a verdict for the plaintiffs for $299·60.

Exceptions were alleged, by the plaintiffs, to the admission of the evidence objected to by them; and by the defendant to the ruling in respect to the statute of limitations.

Boise & R. A. Chapman, for the plaintiffs. The statute of limitations, in this action, begins to run from the time of the return of *non est inventus*. *Rice* v. *Hosmer*, 12 Mass. 127. *Mather* v. *Green*, 17 Mass. 60.

The evidence to reduce damages was improperly received. By the Rev. Sts. *c.* 91, § 2, an officer who takes a bail bond, with one surety only, is liable for the loss sustained by insuf-

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ficiency of the bail. Under *St.* 23 Hen. 6, *c.* 9, which was formerly in force here, a bond with one surety was not a good bail bond. *Long* v. *Billings*, 9 Mass. 482. *Glezen* v. *Rood*, 2 Met. 492.

The cases in which damages have been reduced, in actions like this, are distinguishable. In *Weld* v. *Bartlett*, 10 Mass. 470, where the damages were reduced, the debtor was sick while the execution was in force, and might have been arrested on an alias. In the case at bar, the debtor absconded. In *Shackford* v. *Goodwin*, 13 Mass. 187, though the debtor had absconded, yet the bail had offered to surrender him, and were prevented by the plaintiff's attorney. In *Nye* v. *Smith*, 11 Mass. 188, the debtor might have been arrested, but the execution was put into an officer's hands only two or three days before it was returnable. In all these cases, there was no loss by the fault of the officer.

This case is like *Simmons* v. *Bradford*, 15 Mass. 82, and *Seeley* v. *Brown*, 14 Pick. 177, where full damages were given against an officer who did not deliver a bail bond which he had taken, or alleged that he had taken. See also *Hall* v. *Brooks*, 8 Verm. 485.

The testimony of James S. Hatch, as to the condition of his brother in Alabama, in 1840, was inadmissible, as it did not tend to prove his condition at the time of the service of the original writ, or of the return of *non est inventus* on the execution.

W. G. Bates, for the defendant. As soon as the plaintiffs had opportunity to know, or did know, that the officer had violated his duty, a cause of action accrued, and the statute of limitations (Rev. Sts. *c.* 120, § 3) is a bar. See *Glezen* v. *Rood*, 2 Met. 492. *Miller* v. *Adams*, 16 Mass. 456.

The evidence to reduce the damages was rightly admitted. The cases of *Weld* v. *Bartlett*, 10 Mass. 470, *Young* v. *Hosmer*, 11 Mass. 89, and *Eaton* v. *Ogier*, 2 Greenl. 46, cannot be distinguished from this. See also *Brooks* v. *Hoyt*, 6 Pick. 469. *Russell* v. *Turner*, 7 Johns. 192. *Crooker* v. *Hutchinson*, 1 Verm. 79. The testimony of James H. Hatch, as to his

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brother's poverty in Alabama, was competent for the consideration of the jury, in connexion with his testimony as to his former pecuniary condition, though it might be entitled, of itself alone, to little or no weight.

Dewey, J. 1. The right of action against the defendant, for taking insufficient bail, accrued upon the return of *non est inventus* upon the execution issued against the principal. *Rice* v. *Hosmer*, 12 Mass. 127. *Mather* v. *Green*, 17 Mass. 60. It is true, that by the Rev. Sts. *c.* 91, § 4, the bail bond is required to be returned by the officer to the clerk of the court, and filed with the writ. The omission to perform this duty would subject the officer to an action; but it might be only for nominal damages. He might have taken a good and sufficient bail bond, and having returned upon his writ that he had done so, the creditor might properly waive all claim for damages for the neglect to return it with the writ; and he may do so, as we think, leaving in full force his right to institute an action on the case for taking insufficient bail, after a return of *non est inventus*. The plea of the statute of limitations cannot, therefore, avail the defendant.

2. The rule as to competency of evidence in reduction of damages seems also to be equally well settled. Although the amount of the judgment is *primâ facie* evidence of the measure of damages, yet this may be controlled by evidence showing the entire inability of the debtor to pay, and the actual injury therefore to be less than the amount of the judgment against him. *Weld* v. *Bartlett*, 10 Mass. 473. *Nye* v. *Smith*, 11 Mass. 188. *Rice* v. *Hosmer*, 12 Mass. 127. *Shackford* v. *Goodwin*, 13 Mass. 187. In some of these cases, the principal had not withdrawn from the Commonwealth, and might have been arrested on the execution; but in others, the facts were much like those in the present case. This is particularly true of the case of *Rice* v. *Hosmer*. The fact that the principal debtor was out of the Commonwealth, and could not be arrested on execution, may be important in its bearing upon the amount of damages sustained by the default of the sheriff; but it does not affect the general rule of damages, or the competency of

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evidence tending to show the entire inability of the debtor to satisfy the demand. In all actions on the case, the question is, what is the amount of damage sustained. *Brooks* v. *Hoyt*, 6 Pick. 469.

The statute (Rev. Sts. *c.* 97, § 71,) abolishing the action of debt for an escape, is strongly in affirmance of this rule of damages. Indeed, the only object of such enactment was, to allow, in all cases of this nature, the application of this principle, and not to permit the plaintiff, by changing the form of his action, to evade this rule of damages.

3. The ruling of the court, as to the competency of the evidence given by J. S. Hatch, as tending to show the poverty of Henry W. Hatch, was correct. The evidence was competent, but liable, of course, to the objection, to be taken to the jury, of its weakness and insufficiency to establish the fact attempted to be proved. These were considerations properly to be weighed by the jury, but should not have led to the rejection of the evidence by the court.

Exceptions overruled.

COMMONWEALTH *vs.* AUSTIN C. STOWELL.

In an indictment on the Rev. Sts. *c.* 47, § 2, it is not necessary to allege that the defendant sold spiritous liquor in his dwelling-house or other building.

When an indictment on the Rev. Sts. *c.* 47, § 2, alleges that the defendant "sold to C spiritous liquor, to be used in his dwelling-house," it shall be construed to be the dwelling-house of the defendant.

An indictment alleged that the defendant, on a certain day, "presumed to be a seller of wine, brandy, rum and other spiritous liquors, to be used in and about his house, without being first licensed as an innholder or common victualler, with authority to sell spiritous liquor, and did then and there sell to one C. one half gill of spiritous liquor, to be used in and about his dwelling-house, without being first duly licensed as an innholder or common victualler, with authority to sell spiritous liquors." *Held*, that this indictment was not bad for duplicity; that there was no sufficient charge against the defendant as a common seller, and therefore that the words, which alleged that he presumed to be such seller, might be rejected as surplusage; and that the remaining allegations constituted a sufficient indictment for a single sale.

THE defendant was found guilty, in the court of common pleas, of selling spiritous liquor, without license, to

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divers persons mentioned in different counts in an indictment. The first count alleged that the defendant, at Springfield, on the 10th of August 1844, "did presume to be a seller of wine, brandy, rum and other spiritous liquors, to be used in and about his dwelling-house then and there situate, without being first licensed, according to law, as an innholder or common victualler, with authority to sell spiritous liquors; and did then and there sell to one Thomas L. Clark, one half gill of spiritous liquor, to be used in and about his dwelling-house then and there situate, without being first duly licensed, according to law, as an innholder or common victualler, with authority to sell spiritous liquors, against the peace," &c.

Each of the other counts omitted the allegation that the defendant presumed to be a seller of wine, brandy, &c., without being first licensed as an innholder, &c., and alleged a sale to an individual, in the form adopted in the latter part of the first count.

The defendant moved in arrest of judgment, on the grounds hereinafter mentioned in the opinion of the court. This motion was overruled by the court of common pleas, and the defendant alleged exceptions.

Ashmun, for the defendant.

Porter, (District Attorney,) for the Commonwealth.

Dewey, J. 1. It is objected to the first count in the indictment, that it is bad for duplicity. The argument of the counsel for the defendant assumes that it charges two distinct offences, arising under different sections, viz., §§ 1 and 2 of *c.* 47 of the Rev. Sts. The answer to this objection is, that no offence is charged upon the first section. That offence is that of being a common seller of brandy, rum, &c.; and a proper indictment upon this section, for the offence of selling spiritous liquors, should contain the allegation that the party was such common seller. It is not indeed absolutely necessary to use the word "common," as prefixed to seller, if other equivalent words are introduced, as was held in *Commonwealth* v. *Leonard*, 8 Met. 529, where the allegation in the indictment, that the defendant, from a certain day stated

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on divers days and times, to the time of finding the indictment was a seller of spiritous liquors, &c., was held sufficiently to set forth the offence under the first section. But it seems to us that a mere allegation, that the defendant, on a certain day named, was a seller, &c., is not sufficient to charge the offence of being a common seller. There is, therefore, no offence charged in this indictment, upon the first section of the statute.

The next inquiry is, whether there are introduced into this count all the allegations necessary to charge a single offence under the second section; and this seems clearly sufficiently charged, and with all the particular allegations essential to such a charge. All the residue of the indictment, appertaining to an offence under the first section, but not technically charging such offence, may be stricken out as surplusage, leaving the single offence, charged upon the second section, as the whole charge in this count.

2. It is then contended, that this indictment is defective in not charging the sale of the liquor to have been made in the dwelling-house of the defendant. The answer to this objection is, that it is not required to be so charged; as the statute offence is that of selling to be *used* in the house of the defendant, which may take place without the sale being made within the house.

3. It is next insisted, that the indictment is bad, because it does not allege that the liquor was used in the house of the defendant; but, on the contrary, that it alleges the use of the same to have been in the house of Thomas L. Clark, the purchaser. By a strict grammatical construction, the allegation "did then and there sell, to one Thomas L. Clark, one half gill of spiritous liquor, to be used in and about his house then and there situate, without being first duly licensed," &c., would authorize the words "his house" to be taken to refer to the house of Clark, the vendee. But we do not feel bound to this very strict grammatical reading of this clause in the indictment. We may resort to the entire language of the whole paragraph; and if the charge be plainly

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indicated, and so set forth as to leave no real uncertainty as to the nature of it, it may be held good. See 21 Pick. 521. Looking at the whole count, we think it sufficiently alleges the use of the liquor in the house of the defendant.

4. The remaining inquiry is, whether there be any proper allegation that the defendant was not duly licensed as an innholder or common victualler. So far as there is any question of uncertainty as to the person alleged not to be licensed, the views already presented on the preceding point apply, and fully meet this objection. The other specification of objections under this head, viz. that the form of the allegation should have been, that the defendant was licensed as an innholder, but with the right of vending only ale, beer, &c., as was suggested in *Commonwealth* v. *Thayer*, 5 Met. 247, is answered by the decision in *Commonwealth* v. *Thayer*, 8 Met. 523, where other equivalent words were held to be sufficient, and an allegation very similar to the present was decided to be good.

All the objections, upon which the motion in arrest of judgment has been argued, are overruled.

COMMONWEALTH *vs.* AUSTIN C. STOWELL.

It is not necessary that there should be gaming or betting, in order to render the game of bowls or nine pins an unlawful game, in the cases mentioned in the Rev. Sts. c. 50, § 17.

By the Rev. Sts. c. 50, § 17, a person, not licensed as an innholder, &c., who for hire, gain or reward, suffers persons, from time to time, to resort to a house, &c., by him used or occupied, for the purpose of playing at any unlawful game, does not commit a single continuing offence, but several distinct offences, and is liable to a penalty for each of them.

In an indictment on the Rev. Sts. c. 50, § 17, for suffering persons to resort to a house &c., for the purpose of playing at an unlawful game, it is sufficient to allege that the defendant did, for hire, gain and reward, permit persons to resort, &c., for the purpose of playing at a certain unlawful game mentioned, without alleging that persons actually did resort there for the purpose of playing, or did there play, at any unlawful game.

A defendant, who is found guilty, on the trial of an indictment, is not entitled to a new trial on the ground that a juror was taken from the panel, on the erroneous supposition that there was good cause to challenge him, and another juror substituted, if the defendant did not object at the time.

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In an indictment against the defendant, the first count alleged that he, at Springfield, on the 30th of December 1844, "not being then and there licensed as an innholder, victualler, or retailer of spiritous liquors, for hire, gain and reward, unlawfully did suffer certain persons, whose names to the jurors are unknown, to resort to a certain building there situate, and by said Stowell then and there actually used and occupied, for the purpose of playing at bowls and nine pins, the same being then and there an unlawful game, against the peace," &c. There were four other counts in the indictment, which charged the defendant, in the same terms, with committing a like offence on the 1st, 4th and 11th of January 1845, and on the 8th of February 1845.

At the trial in the court of common pleas, before *Washburn*, J. the district attorney suggested that Chester B. Chappell, a juror from the town of Springfield, should leave the jurors' seat, because said town was interested in the cause, inasmuch as the fine, if any, to which the defendant was liable, would go to the use of the town. The defendant's counsel replied that he was willing to waive any objection to said juror; but said Chappell left his seat, and another juror was sworn and served in his stead; no objection to this course being then suggested by the defendant.

The defendant contended, and asked the court to rule, 1st, that the indictment, though containing five counts, set out only one offence, and that if the jury deemed him guilty, they should find him so only on one count, and not guilty on the others; and 2d, that the indictment did not describe any offence; the game of bowls or nine pins not being an unlawful game, unless accompanied by gaming or betting. The judge declined so to rule, and the jury found the defendant guilty on the first two counts. The district attorney then entered a *nol. pros.* as to the other counts.

The defendant alleged exceptions, and also moved in arrest of judgment, on the ground that Chappell should not have left the jury. This motion was overruled, and further exceptions were alleged by the defendant.

Ashmun, for the defendant. All parties, at the trial, mistook

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the law as to Chappell's competency to sit as a juror in this case; overlooking the Rev. Sts. *c.* 95, § 28, which take away the cause of challenge which was supposed to exist. The defendant had a right to be tried by the panel, as alphabetically arranged. Rev. Sts. *c.* 95, §§ 20–23.

The Rev. Sts. *c.* 50, § 17, on which the indictment is founded, prohibit the keeping of a building, &c., for the purpose of playing at billiards, &c., and the suffering of persons to resort to it for that purpose. The offence, of which the defendant is found guilty, was a single, continuing offence, and should have been alleged to have been committed on divers days, &c.

The indictment is bad for want of an allegation that persons resorted to the defendant's building, and resorted there for the purpose of gaming, or that they actually played there at the game of bowls or ninepins. This is a case in which it is not sufficient to use the words of the statute only. See Davis Just. 536. *Commonwealth* v. *Thurlow*, 24 Pick. 374. *Commonwealth* v. *Pray*, 13 Pick. 362.

Porter, (District Attorney,) for the Commonwealth. This indictment, in each count, is like that in *Commonwealth* v. *Goding*, 3 Met. 130, to the form of which no objection was taken. And that case decides that the charge against the present defendant is within the second prohibition of the Rev. Sts. *c.* 50, § 17. See also *Tanner* v. *Trustees of Albion*, 5 Hill, 121. This section describes two offences: 1st, the keeping of tables for the purpose of playing at billiards, &c.; and 2d, the suffering of persons to resort, &c., for the purpose of playing, &c. However it may be as to the first offence there described, the second is not a continuing offence; for the words are, that "for every such offence" the person so offending shall forfeit, &c.

It is true that, by the Rev. Sts. *c.* 95, § 28, the juror who withdrew from the panel was not subject to challenge. Whatever might have been the defendant's rights at this time, if the juror had been set aside upon challenge, he cannot now object that there has been a mistrial. He has waived such objection, by not insisting upon it at the trial. Rev. Sts. *c.* 95,

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§ 30. *Fox* v. *Hazelton*, 10 Pick. 278. *Jeffries* v. *Randall*, 14 Mass. 205. *Page* v. *Inhabitants of Danvers*, 7 Met. 326, and cases there cited.

DEWEY, J. The case of *Commonwealth* v. *Goding*, 3 Met. 130, is a decisive authority to show that the game of bowls is an unlawful game, within the provisions of the Rev. Sts. *c.* 50, § 17. The next question raised is, whether it be competent to charge the defendant for two distinct offences, under that statute. If the offence charged was the keeping, in his dwelling-house, of tables for the purpose of playing at billiards — which is the offence first described in this section — the argument that this was one continuing offence, and not susceptible of a division, or properly chargeable as distinct offences, would deserve consideration. But the case before us does not present that question. The statute provides that, "if any person, not licensed as an innholder, victualler, or retailer of spiritous liquors, shall keep, or suffer to be kept, in any house, building, yard, garden or dependency thereof, by him actually used or occupied, any tables for the purpose of playing at billiards, for hire, gain or reward, *or* shall, for hire, gain or reward, suffer any person to resort to the same for the purpose of playing at billiards, or any other unlawful game, every person so offending shall, for every such offence, forfeit," &c. It is this latter offence, and not the act of keeping a house or place for playing at billiards, &c., which is the subject of the present indictment. The offence here charged is not a continuing offence. It consists in permitting persons, for hire and reward, to resort to a building used by the defendant, for the purpose, on their part, of playing at bowls. This offence may be repeated from day to day, and in connexion with different individuals, and of course may be the subject of distinct indictments, or distinct counts in the same indictment. Such being the nature of the offence, it is properly charged on a single day certain, and not on divers days and times.

It is then objected to the sufficiency of this indictment, that it does not allege that the persons, who resorted to the building used by the defendant, actually played there at the

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game of bowls. But the statute offence is complete, if they were permitted by the defendant to resort to a building by him used for the purpose of playing at bowls. The indictment is, we think, sufficient in this respect.

It is further objected to the indictment, that it does not allege that any persons resorted to the building of the defendant for the purpose of playing at bowls. This objection arises upon the collocation of the words "for the purpose of playing at bowls." These words, alleging the purpose, &c., are supposed by the counsel for the defendant to be solely applicable to the building, and introduced to define the character of the house, and not the purpose for which the visitors resorted to the house. This, as it seems to us, is an erroneous reading of the indictment. The allegation of "the purpose of playing at bowls" seems more directly to be applied to the persons who resorted to the house. The allegation is, that the building was actually used and occupied by the defendant, and that, while it was thus occupied and used, he, for hire and reward, permitted certain persons to resort thereto for the purpose of playing at bowls. The language is reasonably certain and brings the case within the statute.

A new trial is also moved for, on the ground of certain alleged improper proceedings in the empannelling of the jury for the trial of the cause. Under the impression that any one of the panel, who might be an inhabitant of Springfield, would be incompetent to serve as a juror in this case, the district attorney suggested that it might be proper that Chester B. Chappell should withdraw from the jury. This was assented to by the presiding judge, and no objection was taken by the defendant. The ground now taken is, that Chappell was competent, under the provisions of the Rev. Sts. c. 95, § 28, and ought therefore to have been retained on the jury. Supposing such to be the fact, yet we perceive no ground for a new trial for this cause. The defendant was conusant of the withdrawing of the juror, and made no objections to it. If he would avail himself of the right to the service of any person as a juror, or rely upon an objection to an individual being

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placed on the jury for the trial of his cause, he must take the objection, if he has an opportunity so to do, before the case proceeds to trial and a verdict is rendered. This opportunity he fully had in the present case, and by not presenting his objection, he waived all right to take it after verdict.

Without considering how far it is competent for the presiding judge to interpose in the arrangement of the panel of jurors, and to excuse any member thereof from serving, we are all clearly of opinion that the acquiescence of the defendant in the proceedings in the present case estops him from raising any objection on this ground. Rev. Sts. *c.* 95, § 30. *Fox* v. *Hazelton*, 10 Pick. 278.

Exceptions overruled.

JONAS MOULTON *vs.* ELIPHALET TRASK.

When a minor makes a contract, either absolute or conditional, to labor for a year, for $100, and his employer, without sufficient cause, discharges him before the year expires, indebitatus assumpsit may be maintained for the minor's wages for the time during which he labored; and his employer is bound to pay at the rate of $100 a year, deducting any loss that he may have sustained from the minor's unfaithfulness, or occasional absence without leave.

INDEBITATUS ASSUMPSIT for labor alleged to have been performed for the defendant by the plaintiff's minor son. There was also a count on a *quantum meruit*.

At the trial in the court of common pleas, before *Williams*, C. J. the plaintiff's son testified that he applied to the defendant, who is an iron founder, to take him to learn the business of moulding; and that a contract was made, by which he agreed to work for the defendant for the term of one year, if he liked, and the defendant agreed to furnish him board, and pay him at the rate of $100 a year. The defendant introduced evidence tending to show that the contract was for one year's service, upon the terms stated by the son, but without the qualification, "if he liked."

It appeared that after the son had been in the employment

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of the defendant about five months, he was discharged by the defendant; and that no reason or cause was then or afterwards assigned by the defendant, to the plaintiff, or to his son, why he so discharged him.

The defendant offered evidence tending to show that, while the son remained with him, he was idle and unfaithful, and was absent, on several occasions, one, two, or three days, without asking the defendant's consent to such absence. The plaintiff offered evidence tending to show that his son was diligent and faithful, and that the defendant made no complaint of his absence. The defendant also offered evidence tending to show that an apprentice, at the branch of work in which the son was employed, would ordinarily earn nothing beyond his board, during the first six months of his apprenticeship, and that this was particularly true of the plaintiff's son.

The defendant contended that, whether the contract was with or without the qualification stated by the son, indebitatus assumpsit would not lie, but that the contract should have been specially declared on; but the judge ruled otherwise. The judge also ruled, that if the contract was as stated by the son, or if it was without the qualification stated by him, and the defendant, without sufficient cause, discharged him from his service, before the expiration of the year, the plaintiff was entitled to recover for the time during which his son was in the defendant's employment, at the rate of $100 a year, deducting therefrom any loss which the defendant might have sustained from the son's unfaithfulness or occasional absence without leave. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to said rulings of the judge.

H. Morris & G. B. Morris, for the defendant. The plaintiff should have declared on the special agreement. The general counts cannot be maintained in this case. *Algeo* v. *Algeo*, 10 S. & R. 235. *Phelps* v. *Sheldon*, 13 Pick. 50. *Champlin* v. *Butler*, 18 Johns. 169. *Young* v. *Preston*, 4 Cranch, 239. Part of the payment was to have been made

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in the board of the plaintiff's son; and in such a case, indebitatus assumpsit will not lie. 1 U. S. Digest, Assumpsit, 186, 192, 208, 210.

The contract price is not to be recovered on a general count. *Dickey* v. *Linscott*, 7 Shepley, 453. 1 Dane Ab. 223, 228. *Linningdale* v. *Livingston*, 10 Johns. 36. When the contract has been received in evidence, on the general counts, it has been for the purpose of protecting the defendant, that is, to prevent his being made liable for more than he had promised to pay. See *Hayward* v. *Leonard*, 7 Pick. 185. That reason does not exist in the present case. Besides; the plaintiff could not earn any thing beyond his board, while he labored for the defendant.

Boise, for the plaintiff. When a contract ceases to be executory, the general counts in assumpsit are proper to be adopted by the party who seeks to enforce the contract. *Felton* v. *Dickinson*, 10 Mass. 287. *Baker* v. *Corey*, 19 Pick. 496. *Hill* v. *Green*, 4 Pick. 114. *Hoar* v. *Clute*, 15 Johns. 224. *Perkins* v. *Hart*, 11 Wheat. 237. A minor's wages are protected, though he violates his contract. *Moses* v. *Stevens*, 2 Pick. 232. *Vent* v. *Osgood*, 19 Pick. 572. And the contract price is recoverable, though the contract is not fully performed. *Hayward* v. *Leonard*, 7 Pick. 181. *Frazier* v. *Cushman*, 12 Mass. 277.

Shaw, C. J. It appears to the court that the instructions were right, and that, in the case supposed, indebitatus assumpsit would lie. The question whether the son was idle and unfaithful was left to the jury, upon instructions which were not excepted to. There was conflicting evidence upon the point whether the contract was absolute, for a year, or qualified, as the son testified, for a year, *if he liked*. It was in reference to this, that the instruction was given, which is excepted to. It was this; that if it was without such qualification, that is, for a year certain, still, if the defendant, without sufficient cause, discharged him from his service, before the expiration of the year, the plaintiff was entitled to recover, *pro ratâ* for the portion of the year.

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The rule of law is well stated by the defendant's counsel, that when a special contract is open and unexecuted, and the plaintiff proceeds for a breach of it, he must declare specially, and set it out, and aver a breach; and that indebitatus assumpsit will not lie. But when a contract is at an end, either by its own original terms, or by the subsequent consent of the parties, or by the unjustifiable act of the defendant, and nothing remains but to pay money, indebitatus assumpsit will lie, although the debt accrued under a special contract; and such special contract may be proper and necessary evidence in support of the action. *Grissell* v. *Robinson*, 3 Bing. N. R. 15, and 3 Scott, 335. *Felton* v. *Dickinson*, 10 Mass. 287. *Baker* v. *Corey*, 19 Pick. 496. *Perkins* v. *Hart*, 11 Wheat. 237.

The case put by the judge was, that if the further performance of the contract had been dispensed with or permitted by the defendant, the plaintiff might declare in indebitatus assumpsit, for the part of the money already earned, conformably to the terms of the contract. The instruction rightly proceeded on the ground, that if the defendant had, without justifiable cause, prevented the further performance of the contract, the plaintiff, by bringing his action for the part of the year, during which the son had served, thereby assented to the act of the defendant, and the contract was thereby determined. Had the plaintiff proceeded for the wages of the whole year and the board for the unexpired part of the year, then he would have proceeded as upon the open and executory contract; he must have set it out in a special declaration, and averred a performance, or readiness to perform, on the part of the son, and a breach on the part of the defendant; and general indebitatus assumpsit would not lie.

Exceptions overruled

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James Palen *vs.* Roswell Shurtleff.

P., the second indorser of a note, residing in New York, duly received notice from a notary public of the dishonor of the note, and also a like notice from the notary, addressed to S., the first indorser, who resided at Springfield, but whose residence was unknown to the notary: P., on the day on which he received these notices, transmitted to S., by mail, the notice addressed to him by the notary. *Held*, that this notice, so transmitted, was sufficient to render S. liable to P., who had paid the note.

Assumpsit by the second against the first indorser of the following note: "Springfield, 13th June 1842. Four months after date, I promise to pay to the order of R. Shurtleff, Esq., at the Phœnix Bank, Hartford, Conn., two hundred and eighty five dollars and eleven cents, for value received. O. W. Wilcox." The note was indorsed in blank by R. Shurtleff (the defendant) and James Palen (the plaintiff.) It was also indorsed by W. Edmonds, cashier of the Mechanics Bank in New York, who ordered it to be paid to H. S. Bunce, Esq., cashier of the Phœnix Bank, or order.

The case was submitted to the court on the agreed statement which follows: Shurtleff, the payee and first indorser, resides in Springfield. Palen and Edmonds, the second and third indorsers, reside and do business in the city of New York. The note was presented at the Phœnix Bank, in Hartford, for payment, and was protested for non-payment on Saturday, the 15th of October 1842, by Walter Mitchell, a notary public, who, being ignorant of the place of residence or business of Shurtleff and Palen, enclosed a notice to each of them in a letter directed to Edmonds, the last indorser. Edmonds received these notices on the 17th of said October, and delivered them to Palen on the same day; and Palen, on the same day, deposited the notice to Shurtleff in the post office at New York, addressed to him at Springfield. This notice was received by Shurtleff, in due course of mail, on the morning of October 19th. The following is a copy of this notice: "Phœnix Bank, Hartford, 15th October 1842. R. Shurtleff, Esq. Sir: O. W. Wilcox's note for $\$285\frac{11}{000}$ dollars, at four months from June 13th 1842, indorsed by you, was this even-

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ing protested for non-payment. This is to notify you that the holder looks to you for payment. Yours, &c. Walter Mitchell, notary public, and attorney for Phœnix Bank." The note was paid and taken up by Palen, the present holder and plaintiff in this suit.

The manner of giving and sending notice, adopted by the notary in this case, was conformable to the general practice and custom of the Phœnix Bank and the other banks in Hartford, when the residence of indorsers is unknown.

H. L. Bunce, the cashier of the said Phœnix Bank, was acquainted with R. Shurtleff and his place of business, on the 15th of October 1842.

H. Morris, for the plaintiff.

F. Cummins, for the defendant.

Shaw, C. J. Upon the facts stated, the court are of opinion that the plaintiff has proved due notice of the dishonor of the note, to enable him to sustain this action. Had this action been brought by the Phœnix Bank, who were holders when the note was dishonored, it is doubtful whether it could have been sustained; because the notice should have been sent direct to the indorser, the defendant, whose place of residence was known to the cashier, from whom the notary might, on inquiry, have ascertained the fact. But the question now arises in a suit by a second indorser, who has been obliged to pay the note, against a first indorser.

Every indorser, in a suit against a prior indorser, may avail himself of due notice of dishonor, given by the holder, if such notice has in fact been given. But he is not obliged to rely upon such notice; and as he has, in general, no means of knowing whether such notice has been given, and as the holder is not bound to give notice to all the indorsers, but only to such one or more of them as he means to resort to for payment, it is competent for him, when he himself receives notice, to notify such prior indorser or indorsers as he means to look to; and it is safer for him to do so. And the law allows him an entire day to do this; that is, it is sufficient that he forwards such notice the day following that on which he received notice. *Grand Bank* v. *Blanchard*, 23 Pick. 305.

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Let us apply these rules to the present case. The note would have become due on the 16th of October; but the last day of grace being Sunday, it fell due and was protested on Saturday the 15th. The bank notified their immediate indorser, Edmonds, by whom notice was received seasonably, in New York, on Monday the 17th. He gave notice to Palen on the same day, though it would have been seasonable on the next. Palen therefore was seasonably notified, was bound to pay, and did pay and take up the note. On the same day he forwarded, by mail, the notice to the defendant, which was in due season. *Eagle Bank* v. *Chapin*, 3 Pick. 180.

A doubt was suggested, by the defendant's counse., whether the notice should not have been signed by Palen, as a notice coming from him, and whether his forwarding the notary's official notice was sufficient. But we think there is no ground for such doubt. In general, a notice from any party to a note or bill of exchange will avail any other party who has occasion to prove it. Bayley on Bills, (2d Amer. ed.) 249. *A fortiori* is this true when such notice comes from one who is holder of the note or bill. Here the notice was signed by an officer, duly authorized by the nature of his office, and as the attorney of the bank; and the plaintiff's seasonable transmission of this official notice to the defendant gave him all the information and all the benefit which a formal notice from the plaintiff could have given. *Hartford Bank* v. *Barry*, 17 Mass. 94. *Church* v. *Barlow*, 9 Pick. 547.

Judgment for the plaintiff.

PRESIDENT, DIRECTORS, &c. OF THE CHICOPEE BANK *vs.* MOSES E. EAGER

When a bank is the holder of a note made payable at its banking house, the indorser is bound by a notice of non-payment by the maker, given conformably to the established usage of the bank, though not conformably to the general law.

ASSUMPSIT on the money counts. At the trial in the court of common pleas, before *Merrick*, J. the plaintiffs offered in evi-

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dence a note for $300, dated December 15th 1842, signed by Erastus R. Wood, payable to the defendant, or order, at the Chicopee Bank, in four months from date, and indorsed by the defendant. It appeared that this note was protested at the Chicopee Bank, on the 18th of March 1843, and that notice was sent to the defendant, through the mail, on the same day, directed to him at Cabotville; that the defendant's home and place of business were at Cabotville, a village containing 3000 inhabitants, within the territorial limits of the town of Springfield, and situated between four and five miles from the village of Springfield, which is also within the same territorial limits, and in which the plaintiffs' banking house is situated, and in which the notary resided who protested said note; that there is a post office in each of these villages. and that mails run daily between them, and also between Cabotville and Boston, New York and Albany; and that it is the uniform custom of the banks and notaries in the village of Springfield to give notices in the manner in which the notice was given to the defendant in this case.

The judge, being of opinion that the notice given to the defendant was not sufficient, directed the jury to find a verdict for the defendant, which they did accordingly, and the plaintiffs alleged exceptions.

Norton, for the plaintiffs. In *Peirce* v. *Pendar*, 5 Met. 356, there is an intimation of the court, that though a party, to whom notice is to be given, lives in the town where payment is to be made, yet if he live at a distinct village, where there is a separate post office, the notice may be sent to that office. See also Story on Notes, §§ 322, 323. *Bank of Columbia* v. *Lawrence*, 1 Pet. 578. *Ransom* v. *Mack*, 2 Hill's (N. Y.) Rep. 587. *Sheldon* v. *Benham*, 4 Hill, 129. *Cayuga County Bank* v. *Bennett*, 5 Hill, 236.

W. G. Bates, for the defendant. The mode of giving notice, adopted in this case, is not warranted by any adjudication. When a party lives in "the same town," notice to him through the post office is not sufficient. *Eagle Bank* v. *Hathaway*, 5 Met. 215, and cases there cited. *Smedes* v. *Bank*

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of Utica, 20 Johns. 372. *Remer* v. *Downer*, 23 Wend. 620. *Shepard* v. *Hall*, 1 Connect. 329. *Hartford Bank* v. *Stedman*, 3 Connect. 489. Story on Bills, §§ 297, 382.

DEWEY, J. The defendant, being charged as an indorser of a promissory note payable, by its terms, at the Chicopee Bank, is bound by a notice conformable to the established usage of that bank. *Mills* v. *Bank of U. States*, 11 Wheat 431. The case stated shows that there was such a mode of giving notice established by usage, and that the notice in the present case was given conformably to it. Such being the case, it becomes unnecessary to consider the more novel point brought before us in the arguments of the counsel; namely, whether notice by mail to an indorser residing in a distinct village, four miles distant, but within the same town, addressed to him through the post office of the village in which he resides, is a sufficient notice.

New trial granted.

FREDERICK EDDY *vs.* DAVID AMES, JR. & anotner.

The provisions of *St.* 1844, *c.* 178, § 1, apply to proceedings in insolvency which were pending when it went into operation.

Since *St.* 1844, *c.* 178, went into operation, a discharge of an insolvent debtor is void, if granted by a judge of probate, or master in chancery, at a court not held on the second Monday of a month, or by adjournment, from day to day, of a court held on such Monday.

ASSUMPSIT by the payee against the drawers of a bill of exchange. At the trial in the court of common pleas, before *Ward*, J. the plaintiff gave evidence which was sufficient, *primâ facie*, to entitle him to a verdict.

The defendants offered in evidence a discharge under the insolvent laws of this Commonwealth, granted by a master in chancery on the 6th of November 1844. The plaintiff objected to the admission of this discharge in evidence, and denied that it would, if admitted, be a bar to this action, or have any effect on the claim in suit; because said discharge did not appear to have been granted, and was not in

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fact granted, at any court held according to the following provisions of *St.* 1844, *c.* 178, § 1: "Every judge of probate, or master in chancery, shall, on the second Monday of every month, hold a court for the proof of claims, the examination of debtors, the *granting of discharges*," &c., "and for doing any other matter, now cognizable before said judge or master, relating to insolvency; and said proceedings shall be transacted only in said court, and after due notice to all persons in interest; and if all the business in insolvency, before said judge of probate or master in chancery, cannot be completed on said day, said judge or master may adjourn his court to the next day, and so from day to day, until the same shall, legally and properly, with all reasonable despatch, be disposed of."

The plaintiff introduced the record of the proceedings in insolvency against the defendants, from which it appeared that the warrant to seize their property issued on the 11th of March 1844, returnable on the 30th of said March; that the second meeting of creditors was held on the 15th of April following; which meeting was adjourned to the second Monday of May following, and from that day to the second Monday of June, and so on, from the second Monday of that and of each succeeding month, to the second Monday in October, and then to the aforesaid 6th day of November, when said discharge was granted.

The judge thereupon ruled, that the discharge was not a sufficient defence, and a verdict was taken for the plaintiff To this ruling the defendants alleged exceptions.

R. A. Chapman, for the defendants.

Davis & F. Cummins, for the plaintiff.

Shaw, C. J. The provisions of *St.* 1844, *c.* 178, § 1, took effect in regard to all proceedings to be had in cases of insolvency pending at the time when it went into operation, viz. April 15th 1844. The courts held, after this statute went into operation, at which alone a discharge can be granted, can be held only on the second Monday of each month, or by adjournment, from day to day, of a court held on such Mon-

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day. Hence, the discharge, which was granted in this case, on the 6th of November 1844, is void, it having been granted at a court not held on the second Monday of that month, nor by adjournment from day to day of a court held on the second Monday of the preceding month. The master had no jurisdiction.

Exceptions overruled.

Inhabitants of Palmer *vs.* Inhabitants of Dana.

The town of D., on receiving notice from the town of P. that certain paupers, whose settlement P. alleged to be in D., were supported in P., immediately paid the expense that had been incurred by P. for their support, removed part of the paupers to D., and made provision for the support of the others in P. for the term of about forty days: Within two months from the time of receiving said notice from P., the overseers of the poor of D. replied to that notice, denying that D. was liable to support said paupers, and refusing to pay P. for any further support of them. *Held*, that the town of P. could not maintain an action against the town of D. for the subsequent support of said paupers, without first giving D. a new notice.

Assumpsit to recover the amount of supplies furnished by the plaintiffs to Mary Hatstat, widow of George Hatstat, and her children, paupers, whose settlement was alleged to be in Dana.

The case was submitted to the court on a statement of the facts on which the paupers' settlement depended, (which need not be here inserted,) and the other facts which follow:

"On the 4th of February 1842, and for some time previous, George Hatstat, and his wife and children, who are named in the writ, were paupers, residing in Palmer, and receiving assistance from the plaintiffs, as paupers. On the said 4th of February, and for some time previous, the said paupers belonged to the town of Hardwick; and the expenses incurred for their support in Palmer, on said day, and before that time, have been paid to the plaintiffs by said town of Hardwick. On the 21st of February 1842, a letter was addressed to the overseers of the poor of Dana, by John Gamwell, chairman of the overseers of the poor of Palmer, and by

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direction of the board, in the following words: 'Gentlemen. Mary Hatstat, widow of George Hatstat, and her children, Lucretia, Henry, Mary Jane, Harriet, and Peyton Hatstat, whose lawful settlement (by a recent act of the legislature *) is in Dana, are now in this town, in destitute circumstances, and have called upon us for assistance, which we have rendered to them, to the amount of about thirty dollars, which you are requested to pay, and cause the removal of said paupers, as they are now the lawful charge of your town.'

"On the 25th of the same February, the overseers of the poor of Dana went to Palmer, and paid the expenses incurred by Palmer for the support of said paupers, and took two of said paupers with them to Dana, and made a temporary provision for the maintenance and support of the others, in Palmer, with one Merrick, who made suitable provision for them till the 28th of March then next; which provision was made with said Merrick, with the knowledge of the overseers of Palmer.

"On the 23d of March 1842, the overseers of the poor of Dana addressed a letter to the overseers of the poor of Palmer, in the following words: 'Gentlemen. Your letter of the 21st of February 1842 is before us, stating that Mary Hatstat, widow of George Hatstat, and her children,' (naming them,) 'whose lawful settlement, (you say,) by a late act of the legislature, is in Dana. We deny that said act binds us to support said family, and we shall pay no further charges for them.'

"The plaintiffs gave no notice to the defendants, after that of February 21st 1842, before commencing this action."

R. A. Chapman & Ashmun, for the plaintiffs.

Barton & Bacon, for the defendants.

HUBBARD, J. It appears, by the facts agreed, that on the 21st of February 1842, the overseers of Palmer addressed a letter to the overseers of Dana, giving them notice that Mary Hatstat and others were in that town, in destitute circumstances, and had called for assistance, which they had ren-

* "An act to annex a part of Petersham and Hardwick to Dana." St. 842, c. 8.

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dered, and requested them to pay the amount and cause the removal of the paupers. Four days after the receipt of this notice, the overseers of Dana went to Palmer and paid the expenses incurred, removed two of the paupers, and made a temporary provision for the support of the others, in Palmer, till March 28th. On the 23d of March, the overseers of Dana, believing that the settlement of the paupers was not in their town, addressed a letter to the overseers of Palmer, in which they acknowledge the receipt of the letter of February 21st, deny that they are bound to support the family, and state that they shall pay no further charge for them. The present suit was brought without any other notice to the town of Dana, or demand for reimbursement. The question is, whether the plaintiffs can recover without a new notice and demand; and we are of opinion that they cannot. The same question has been repeatedly before the court, and it has been more than once expressly decided, where a notice has been given by one town to another of their support of a pauper belonging to the town notified, and a request for reimbursement, that if the town satisfies the call, by paying the expense incurred for the support of the pauper, it has done all that the law requires; and that if the pauper shall afterwards become, or continues to be, chargeable to the town which is not bound to support him, still the town cannot recover without a new notice and demand. See *Inhabitants of Sidney* v. *Inhabitants of Augusta*, 12 Mass. 316; *Hallowell* v. *Harwich*, 14 Mass. 188; *Walpole* v. *Hopkinton*, 4 Pick. 358; and *Attleborough* v. *Mansfield*, 15 Pick. 19. And the objection rests upon reason as well as upon authority. For as towns are liable for the support of paupers by force of the statute only, in order to make them chargeable, the case presented must be within its provisions; and, as stated by the court in *Hallowell* v. *Harwich*, they may be ignorant of the state of the pauper, his distress may have been temporary, or he may have gone to another town. To create, then, a further immediate liability, there must be a new notice.

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AMENDMENT.

1. A petition to county commissioners to alter a town way according to a report of selectmen, which the town is alleged to have unreasonably refused to accept, may be amended, even after a hearing of the parties on the petition, by striking out the alleged unreasonable neglect of the town, and substituting an allegation of the unreasonable neglect of the selectmen to

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alter the way. *Inhabitants of New Marlborough* v. *County Commissioners*, 423.

2. An amended petition to county commissioners may well be signed by the petitioners' attorney, although they signed their own names to the original petition. *Ib.*

3. An amendment may be made, by leave of court, of an officer's return of an attachment of land, by affixing his signature to the return, although another officer has duly returned a subsequent attachment of the same land in another suit. *Childs* v. *Barrows*, 413.

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ARREST.

A police officer of the city of Boston, appointed under St. 1838, c. 123, with all the power of a constable, except that of serving civil process, who arrests an intoxicated person, while guilty of disorderly conduct, and releases him on his promise to go directly home, may lawfully retake him on his going into a bar room before he is out of the officer's sight. *Commonwealth* v *Hastings*, 259.

ASSIGNMENT

A debtor assigned the property described in a schedule, in trust for his creditors, and afterwards delivered to the assignee a chattel not included in the schedule, either knowing that it was not so included therein, or intending, whether it was so included or not, that it should be appropriated to the benefit of his creditors. *Held*, that the property in the chattel passed to the assignee, in trust for the creditors, and that the assignor could not reclaim it *Faxon* v *Durant*, 339.

See BOTTOMRY, 2. PARTNERSHIP, 2. TRUST, &c

ASSUMPSIT.

1. When A. pays a debt of B., without B.'s previous request, and on informing B. thereof, B. merely asks him why he paid it, he does not ratify the act of A., so as to render himself liable to A. for reimbursement. *Winsor* v. *Savage*, 346.

2. A. was employed by C. to do work on vessels owned jointly by C. and S., and on vessels owned solely by C., and charged the work, on his book, to the respective vessels and owners, and received payments, in part, at different times, from C., but not in settlement of any balance: A. subsequently rendered bills of all the work to C., whose name only was mentioned in the bills, and credited all the payments made by C., leaving a balance in favor of A., for which he refused to receive C.'s note, though offered by C. in payment, lest he should thereby discharge S., and lose his lien on the vessels upon which his work was done C. was afterwards declared bankrupt,

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and A. proved his claim against him, for said balance: C.'s assignee brought an action against S. to recover the amount thus paid by C. for S., and while the action was before an auditor, A. executed a release of S., and left it for S. with the auditor. *Held*, in said action, that A. had so far given credit to C. that he could sue C. alone for the work done, and that a discharge of him would be a discharge of S. also; that S. had received his full share of the benefit of the work done by A.; that the proving of A.'s claim on C. for the balance, under the proceedings in bankruptcy, and his release of S. were equivalent to payment by C.; and that S. was liable to C.'s assignee for the amount sued for in the action. *Ib.*

3. When an assignee, under *St.* 1836, *c.* 238, has in his hands assets of the assignor, more than sufficient to pay, in full, all the creditors who executed the assignment, and declares a dividend to all those creditors, and pays all of them, but one, in full, and pays over a surplus to the assignor, he is liable to the creditor whom he does not pay, in an action for money had and received. *Fitch* v. *Workman*, 517.

ATTACHMENT.

The provision in the Rev. Sts. *c.* 90, §§ 83, 84, that "when any person shall claim any title or interest, by force of a subsequent attachment, or purchase, or mortgage, *or in any other manner*, in any estate that is attached in a suit between other persons, such claimant may be allowed to dispute the validity and effect of the prior attachment, and may file his petition praying that the prior attachment may be dissolved," does not authorize a person, to whom property was mortgaged before it was so attached, to maintain such a petition. *Peirce* v. *Richardson*, 69.

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AWARD.

By an agreement of submission to arbitration, the arbitrators were to determine between A. and B., 1st, whether A. had finished a certain dwelling-house, according to his contract with B., and what, if any thing, remained to be done upon the house by A., and how much, if any thing, remained to be paid by B. to A., and what damage, if any, should be deducted and allowed to B. for the failure of A. to perform the agreement to build the house; 2d, to determine and decide what amount, if any, remained to be advanced by B. to A., and what remained to be done, if any thing, by A., upon a certain other dwelling-house, to finish it, conformably to another contract between him and B.; and the parties agreed to do and perform to each other whatever might be ordered, by the arbitrators, to be done by them respectively. The arbitrators awarded that B. should pay a certain sum to A. in fulfilment of the contract for building the first mentioned house, and that another certain sum remained to be advanced by B. to A. in fulfilment of the contract for building the other house. *Held*, that the arbitrators had not

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decided all the matters submitted to them, and that their award was therefore bad. *Houston* v. *Pollard*, 164.

BANK.

1. The provision in the Rev. Sts. c. 36, § 30, that "if any loss or deficiency of the capital stock in any bank shall arise from the official mismanagement of the directors, the stockholders at the time of such mismanagement shall, in their individual capacities, be liable to pay the same," does not enable the creditors of the bank to maintain a suit against the stockholders, to recover payment of their demands against the bank. And if the stockholders were liable to a suit of the creditors, under that section, it would be barred by the statute of limitations, (Rev. Sts. c. 120, § 1,) in six years from the time of the loss or deficiency of the capital stock. *Baker* v. *Atlas Bank*, 182.
2. Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or of its customers required it, certified that checks were "good," which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller as such. *Mussey* v. *Eagle Bank*, 306.
3. The usage of issuing certificates of deposit, by a teller of a bank, is not evidence to prove a usage of certifying checks. *Ib.*
4. A teller of a bank, as such, has no authority to certify that a check is "good," so as to bind the bank to pay the amount thereof to any person who may afterwards present it; and a usage for him so to certify a check, to enable the holder to use it at his pleasure, is bad. *Ib.*

See Bill of Exchange, 1. Promissory Note, 4.

BANKRUPT.

1. Under the fourth section of the United States bankrupt act of 1841, a discharge of a bankrupt, when it is set up as a bar to an action against him, may be impeached and avoided by proof of his having given to one or more of his creditors a preference, which the second section declares to be a fraud upon that act. *Beekman* v. *Wilson*, 434.
2. Certain creditors of a bankrupt, who had proved their claims against him, opposed his discharge, and an issue was framed and tried in the district court of the United States, involving the question whether the bankrupt had been guilty of any fraud or wilful concealment of his property, or had preferred any of his creditors, contrary to the provisions of the bankrupt act; the jury returned a verdict in his favor, and the court granted a discharge and certificate: Afterwards, a creditor, who did not prove his claim under the proceedings in bankruptcy, nor appear before said court to oppose said discharge, brought an action against the bankrupt, who set up said discharge as a bar *Held*, that the verdict was not conclusive against the

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plaintiff, and that he might impeach and avoid said discharge, by evidence that the defendant had preferred one creditor to another, contrary to the provisions of the bankrupt act. *Ib.*

See INSOLVENT DEBTORS, 1.

BILL IN EQUITY.

See EQUITY.

BILL OF EXCHANGE.

1. When the holder of a bill of exchange, accepted for the accommodation of the drawer, sends it to a bank for collection, and the bank, when the bill comes to maturity, passes the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor; but the bank succeeds to the rights of the holder, and may maintain an action on the bill against the acceptor. *Pacific Bank* v. *Mitchell*, 297.

2. H., the agent, in Boston, of W. & Co., bankers in London, gave this letter of credit: "I hereby authorize R. & Co. to value on W. & Co. at six months' sight, at Canton, for the account of G. of Boston, for any sums not exceeding £6000 sterling; and I hereby engage, as the authorized agent of W. & Co., that the bills of R. & Co. shall be duly honored, when presented, if drawn within twelve months from the date of this letter:" G. at the same time engaged to remit to W. & Co., in London, funds sufficient to meet the payment of all bills drawn by virtue of the said letter of credit: G. transmitted this letter to R. & Co., at Canton, and requested them to draw bills pursuant to said letter, to dispose of the bills, and to invest the proceeds in merchandize on G.'s account, and ship it to him in the United States: R. & Co. drew bills, accordingly, on W. & Co., and with the proceeds thereof purchased merchandize and forwarded it to G., which he received and accepted: W. & Co. accepted the bills, but failed in business before the bills fell due: F., one of the firm of R. & Co., resident in Boston, on hearing of the failure of W. & Co., made an arrangement with B. & Co. of London, to take up these bills at maturity, (and other like bills, to a much larger amount, drawn by R. & Co. on W. & Co., and by them accepted,) for the honor of R. & Co., the drawers; and B. & Co. accordingly took them up, supra protest. By this arrangement with B. & Co., F. was to send funds to them; and B. & Co. were to make advances for R. & Co. on merchandize by them before consigned to B. & Co. for sale, and were to hold the merchandize as security for such advances: F. remitted bills of exchange to B. & Co., which he purchased at a premium of twenty one per cent., which was then the rate of exchange between the United States and London, but was less than would have been the damages, if the bills drawn by R. & Co. had been returned to them at Canton: The bills thus purchased were remitted, at different times, to meet the bills drawn by R. & Co. on W. & Co., as they might fall due, and not especially for the payment of the bills drawn on G.'s account: G. did not remit funds to W. & Co. to meet the payment of these bills at maturity; but he afterwards sent funds to them, with which W. & Co. took up those bills, by paying to B.

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& Co. the amount thereof, with interest, bankers' commissions and notaria. charges: R. & Co. afterwards brought an action against G. to recover damages sustained by them, *first*, in paying a premium on their remittances to B. & Co., and *secondly*, in the loss arising from their not being able to draw against the merchandize in the hands of B. & Co., which was held by them as security for their advances towards taking up bills for the plaintiffs' honor. *Held*, that G., by requesting R. & Co. to draw said bills, undertook and was liable to indemnify them for so doing; that this liability was not extinguished or affected by G.'s furnishing funds to W. & Co., and by their payment to B. & Co. of the bills, with interest and charges; that R. & Co. had a legal right to protect their credit, by causing the bills to be paid supra protest for their honor, without waiting for a return of the bills to them at Canton; and that the loss, arising from the premium paid for remittances, should be assessed equally and ratably upon all the bills paid for R. & Co. by B. & Co.; but that G. was not liable to R. & Co. for any loss arising from their not being able to draw against their merchandize in the hands of B. & Co. *Greene* v. *Goddard*, 212.

See PARTNERSHIP, 1

BILL OF LADING.

See TROVER, 1.

BOSTON WATER POWER COMPANY.

See TAXES, 2. 3.

BOTTOMRY.

1. When a bottomry bond is given to secure debts for which simple contract securities have been previously given, the bond cannot be regarded as merely collateral security, but the simple contracts are merged in the bond, and the previous securities cannot afterwards be enforced. *Bray* v. *Bates*, 237.

2. B. made a loan to A., on A.'s vessel, and it was agreed between them, among other things, that any merchandize purchased abroad, with B.'s consent, with the freight money earned on the outward voyage of the vessel, should be shipped to B. for sale on commission: When the vessel was about to sail, B. advanced money to A. on the outward freight, and A. agreed that said freight should be remitted to B.'s correspondent abroad, for B.'s account, B. to account therefor to A.: B. gave direction to the master of the vessel to remit said freight accordingly, except enough thereof to purchase a return cargo of salt at Cadiz, and to ship the salt to order, and send the bill of lading to B.: The master, at A.'s request, wrote to B. agreeing to obey said directions; and he obeyed them, and purchased a cargo of salt at Cadiz, which was shipped by C., A.'s agent, and consigned to order: The master signed duplicate bills of lading, one of which was indorsed by C. and forwarded to B.: Before the vessel returned, A. gave to B. a bottomry bond to secure about four fifths of all that was due from him to B., and a negotiable note, secured by mortgage, for the balance: (In the

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return of the vessel, the master delivered to A. the other bill of lading which was not indorsed, and A. assigned it to the master, and also gave him a mortgage of the salt. *Held*, that the agreement between A. and B. as to the return cargo, was superseded and extinguished by the bottomry bond and note; that the said assignment and mortgage to the master were valid and that the master was entitled to the cargo. *Ib.*

BOUNDARY.

See COVENANT, 3.

BURDEN OF PROOF.

See EVIDENCE, 2. INSOLVENT DEBTORS, 5. LIBEL, 2. MURDER.

BY-LAW.

1. The fifth section of the by-law of the city of Boston, passed on the 2d of March 1843, for the regulation of Faneuil Hall Market, is valid, which provides that "no inhabitant of said city, nor any inhabitant of any town or city, whose dwelling-house is less than twenty miles distant from said market, shall, at any time, without the permission of the clerk of said market, occupy any stand therein, with cart, wagon, sleigh, or otherwise, for the purpose of vending any articles within the limits of said market, unless he shall, before selling or offering to sell such articles, satisfy the said clerk, when requested, that all the said articles are the produce of his own farm, or of some farm not more than three miles distant from his dwelling-house." *Commonwealth* v. *Rice*, 253.
2. It is a violation of said section, for an inhabitant of Boston to occupy a stand within the limits of the market, and there offer for sale articles which are the property of a person residing more than twenty miles from the market, as the agent of such person, and by his direction, without satisfying the clerk of the market, when requested, that the articles are the produce of such inhabitant's own farm, or of some farm not more than three miles distant from his dwelling-house. *Ib.*
3. A stand may be occupied, within the meaning of said section, by a person's having a box, within the limits of the market, containing articles for sale, and offering them for sale. *Ib.*
4. A complaint for violation of said section is sufficient, if it allege that the defendant, without satisfying the clerk, &c., occupied a stand, within the limits of the market, with a box, for the purpose of vending articles there, without alleging that the box was of such a size as to be capable of being used as a stand. *Ib.*
5. The first section of said by-law does not require that the clerk of the market, before entering a complaint for violation of the regulations of the market, should have the direction of the mayor and aldermen to make such complaint. *Ib.*

See INSURANCE, 1

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CARRIER.

1 Proprietors of coaches, who carry passengers for hire, are answerable to a passenger for an injury which happens by reason of any defect in a coach, which might have been discovered by the most careful and thorough examination, but not for an injury which happens by reason of a hidden defect, which could not, upon such examination, have been discovered. *Ingalls* v. *Bills*, 1.

2. A passenger in a coach received an injury solely by reason of the breaking of one of the iron axletrees in which there was a very small flaw, entirely surrounded by sound iron one fourth of an inch thick, and which could not be discovered by the most careful examination externally. *Held*, that the proprietors of the coach were not answerable for the injury thus received. *Ib.*

3. If a passenger in a coach, by reason of a peril arising from an accident for which the proprietors thereof are liable, is in so dangerous a situation as to render his leaping from the coach an act of reasonable precaution, and he leaps therefrom and thereby breaks a limb, the proprietors are answerable to him in damages, though he might safely have retained his seat. *Ib.*

CERTIORARI.

See Costs, 4. Way, 3. 5.

CHAMPERTY.

An agreement between A. and B., that B. shall prosecute and manage A.'s suit at law, as A.'s agent, and that he shall receive, for his services, a certain per cent. on the amount that shall be recovered, and that, if he does not recover, A. shall pay him no more than his actual expenses, amounts to champerty, and is so far illegal and void, that B., after obtaining judgment for A. cannot maintain an action on the agreement. *Lathrop* v. *Amherst Bank*, 489

CHARITABLE USES.

A bequest, for charitable uses, to an unincorporated female society in another State, composed in part of married women, is valid; and a court of equity will appoint a trustee to receive the bequest, in trust of such charities as are administered by such society. *Washburn* v. *Sewall*, 280.

CHECK.

See Bank, 2. 4.

COLLECTOR.

1. When a collector of taxes is removed from office, he and his sureties are liable, on his official bond, for such part of the taxes committed to him as are lost by reason of his remissness, although the uncollected taxes have been committed to his successor, who has also given bond for the faithful discharge of the duties of his office. *Inhabitants of Colerain* v. *Bell*, 499.

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2. When the same person is collector of taxes for two successive years, and pays to the town the arrears of taxes collected on the tax list of the first year, with the money collected on the tax list of the second year — the town not knowing whence the money came — and fails to perform the condition of his official bond for the second year, his sureties on that bond, when sued for his default, are liable to the extent of the default, and are not entitled to deduct the amount so paid by him for the taxes of the first year. *Ib.*

3. When a collector is removed from office within a year after the taxes are committed to him to collect, his sureties, if sued on his official bond, may give evidence, for the purpose of reducing damages, that the uncollected taxes of certain persons on his tax list could not be collected, by reason of their inability to pay. *Aliter*, if the collector was not removed until after a year from the time when the taxes were committed to him. *Ib.*

COMPLAINT.

See By-law, 4. 5.

CONDITION.

One incorporated manufacturing company recovered judgment against another, and took out execution for $2868·93, and afterwards voted that the whole affair relative to said judgment should be left with the directors, with full power to compromise and settle the same in such manner as they should deem expedient: The directors voted that they would receive $1661·35 from the debtor corporation in full satisfaction of the execution, and would receive the notes of the individual members of that corporation, for said sum, payable one half in six months and one half in nine months, with interest, and that the execution should remain in the hands of the treasurer of the creditors, as security for the payment of said notes: Afterwards, R. and other members of the debtor corporation gave their several notes, amounting in the whole to $1661·35, payable in six and nine months from the day on which said directors' vote was passed, and said treasurer signed an instrument acknowledging the receipt of the notes, and agreeing, when they should be paid, if paid when due, to cancel said execution, or transfer it to the makers of said notes, as they should direct: No payment was made on the notes: The creditor corporation, one year after the date of the notes, voted that their treasurer inform the debtor corporation that the compromise aforesaid was no longer considered binding, and that the creditor corporation should look for payment on the execution, and was ready to give up said notes; and this notice was duly given by said treasurer: Afterwards, the creditor corporation sued out a pluries execution, and committed R. to prison thereon; and he brought a writ of *audita querela*, to be relieved from imprisonment. *Held*, that the respective obligations of the parties were to be determined by the terms of the instrument signed by said treasurer; that payment of the notes, as they became payable, was a condition precedent to the discharge of the execution; that the failure so to pay the notes justified the creditor corporation in refusing to discharge the

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execution, and warranted the commitment of R. to prison. *Richardson* v. *Boston Chemical Laboratory*, 42.

See INSURANCE, 1.

CONSTABLE.

See POLICE OFFICER.

CONSTRUCTION.

Of vote. See CONDITION. SPRINGFIELD SCHOOL FUNDS.

Of bond. See USE and OCCUPATION.

Of lease. See COVENANT, 1.

CORPORATION.

See MANUFACTURING CORPORATION. TAXES, 2. 3.

COSTS.

1. Several defendants, in an action for a tort, who had pleaded jointly in the common pleas, pleaded severally in this court, and filed a joint specification of defence. *Held*, upon a nonsuit of the plaintiffs, that the defendants were entitled only to joint costs in the common pleas, but to several costs for travel and attendance in this court. *Held also*, that an aliquot part of the costs for witnesses, court dues, &c., might be taxed for each defendant, or that those items might be otherwise so distributed that, taking them together, the plaintiffs should be charged no more than if the defendants had recovered only joint costs. *Fales* v. *Stone*, 316.
2. When several defendants, who are entitled to several costs, appear by one and the same attorney, the St. of 1842, c. 67, does not prohibit the taxing of the attorney's attendance for each defendant. *Ib.*
3. Three defendants, who were sued in an action for a tort, pleaded severally: At the trial, a nonsuit was entered, subject to the opinion of the whole court: One of the defendants then died, and the whole court afterwards confirmed the nonsuit, and awarded several costs to the surviving defendants: The administrator of the deceased defendant then filed a petition that costs might be allowed to him, as such administrator, and that a judgment might be rendered therefor: Notice of this petition was served on the original plaintiffs, and they appeared and showed cause. *Held*, that no right to costs vested in the deceased defendant, in his life time; that the suit, as to him, was abated by his death; and that the petition could not be supported. *Held also*, that the respondents (the original plaintiffs) were entitled to costs on said petition, and to a judgment therefor against the administrator, *de bonis propriis*. *Ib.*
4. The costs of proceedings before county commissioners, in the alteration of a town way, are matter of discretion with the commissioners; and a writ of *certiorari* will not be granted for the purpose of revising their adjudication as to such costs. *Inhabitants of New Marlborough* v. *County Commissioners*, 423.

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COUNTY COMMISSIONERS.

See AMENDMENT, 1. 2. COSTS, 4. WAY.

COVENANT.

1. A. demised to C., for eleven years, a store bounded on vacant land of S., "excepting and reserving unto said A. the right to stop up and build against the five windows in said store, which front upon" S.'s land, "and also to build against and put timbers into the wall on the side of said store in which the said five windows are, at his pleasure;" and C. covenanted to pay the rent, to keep the demised premises in such repair as they were in at the commencement of the term, and that "no alterations or additions in or to the same" should be made, during the term, without A.'s written consent: There was also a provision in the lease, that if C. should neglect or fail to perform or observe any of the above covenants, A. might lawfully, and without further notice or demand, enter into and upon the demised premises, and repossess the same, as of his former estate: C. afterwards took a lease from S. of said vacant land, for fifteen years, terminable by himself in ten years, and erected a building thereon, in contact with the wall of the store in which said five windows were: A. subsequently entered upon the demised premises, and gave C. written notice that he had "entered for breach of the covenant against making alterations in the said premises, pursuant to the right of entry reserved in the lease," and then brought a writ of entry against C. to recover possession of the premises. *Held*, that C. had not, by thus erecting the building on S.'s lot, broken his covenant that no alteration should be made in the demised premises. *Held also*, that A., by giving notice to C. that he had entered for breach of the covenant not to make alterations, was restricted to the breach thus alleged, and could not maintain his writ of entry by showing that C. had broken his covenant to keep the demised premises in repair. *Atkins* v. *Chilson*, 52.

2. A., as guardian of three of the minor children of a deceased father, and B., as guardian of the other minor children of the same father, sold their wards' real estate at auction, under a license from the probate court, and jointly gave a deed to the purchaser, in which was this covenant: "We, in the capacity aforesaid, do covenant with the said D., his heirs and assigns, that the premises are free of all incumbrances by, through or under us, and that the said D., his heirs and assigns, shall and may peaceably hold and enjoy the same free from the lawful claims and demands of all persons:" D. was afterwards evicted by E. to whom the minors' father had mortgaged the premises. *Held*, that A. and B. were personally and jointly liable to D. on the covenant for quiet enjoyment. *Donahoe* v. *Emery*, 63.

3. When A. conveys land to B., "bounded on land of T.," the true line of T.'s land is the boundary of the land conveyed, although A. and T. had previously agreed, by parol, on a different line, and had set up stakes to mark such line, and had afterwards held possession of their respective lands according to such line; and if B. be evicted from the land lying between the true and the agreed line, he has no remedy on A.'s covenant of

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warranty, unless A., at the time of the conveyance, pointed out the agreed line as the true one. *Cornell* v. *Jackson*, 150.

4. A. orally requested B. to erect a mill dam, and orally promised him that if the dam should flow his land, he would not claim damages for the flowing: B. built a dam and mill, and flowed A.'s land, and afterwards conveyed the dam and mill to C., who continued to flow the land: A. entered a complaint against C. to recover damages for this flowing, and it was decided that he had waived his right to damages, by his agreement with B., and could not recover: A. afterwards conveyed his land to D., with a covenant that it was free from all incumbrances, and D. brought an action against him for breach of this covenant, alleging the right of C. to flow the land without payment of damages. *Held*, that C. had no such right, as against D., by virtue of A.'s oral agreement with B., and that no breach of the covenant was shown. *Fitch* v. *Seymour*, 462.

DAMAGES.

1. When a grantee, who is evicted by the holder of a mortgage made prior to his grant, sues his grantor on the covenant for quiet enjoyment, he is not entitled to recover damages beyond the amount of the mortgage debt, if the mortgage be not foreclosed. *Donahoe* v. *Emery*, 63.

2. A deputy sheriff arrested a debtor on a writ, and took an instrument in the form of a bail bond, except that it was not under seal, signed by said debtor and one surety only, and returned that he had held the debtor to bail: He did not return said instrument with the writ, but filed it in the clerk's office, several months afterwards: The debtor absconded, and the execution which issued against him was returned *non est inventus*: The creditor, having failed to recover of the bail, brought an action against the sheriff for the default of the deputy in not taking sufficient bail. *Held*, that the measure of the plaintiff's damages was the sum that he had lost by the misdoings of the deputy, viz. the sum which the plaintiff would have obtained, if sufficient bail had been taken; that this sum, *primâ facie*, was the amount of the plaintiff's judgment against the debtor; but that evidence of the debtor's inability to satisfy that judgment was admissible in reduction of damages. *Held also*, that evidence as to the debtor's property and business, a year or two after the plaintiff's execution against him was returned, was competent to be considered by the jury, with reference to the reduction of damages against the sheriff. *West* v. *Rice*, 564.

See Bill of Exchange, 2. Infant, 2. Promissory Note, 8.

DISTRESS.

See Taxes, 1.

EASEMENT.

1. An easement cannot be extinguished or renounced by a parol agreement between the owner of the dominant and the servient tenement. *Dyer* v. *Sanford*, 395

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2. A license, given by the owner of the dominant to the owner of the servient tenement, to obstruct an easement, is not revocable after it is executed, and may operate as an abandonment of the easement, to the extent of such license. *Ib.*

3. The owner of a dominant tenement may make such changes in the use and condition of his estate as to renounce the easement; and this may be relied on, by the owner of the servient tenement, as an abandonment thereof: But, in order to prove such abandonment, it must be shown that the acts relied on were done voluntarily by the owner of the inheritance, who had authority to bind the estate by his grant or release, and were of so decisive and conclusive a character as to prove his intention to abandon the easement. *Ib.*

4. A. conveyed to B., in 1799, land and a new house thereon, bounding said land northerly on the estate of D.: B.'s administrator conveyed to D. a narrow piece of B.'s land adjoining the land of D., "reserving to the house of B. the right of eaves-drops where it bounds on said lot, and also the right of forever keeping open the staircase window at the back of said house, bounding on said lot," said window being twenty five inches distant from the line of D.'s land, as it stood before said narrow piece was conveyed to D.: The widow of B., having a right of dower in his said estate, and being in the occupation thereof, afterwards gave a parol license to D. to stop up said window, and he accordingly did so: The devisees of D., in 1805, conveyed his estate to I., by deed of warranty, "subject to the reservations expressed in the deed of B.'s administrator to D., of the right of eaves-drops, where the estate late of B. bounds on the land sold by said administrator to D., and the right of forever keeping open the staircase window at the back of the house bounding on said land:" In 1836, the estate of B. was conveyed to E.: In 1831, W., who then owned D.'s estate, partially obstructed said window; and it remained so obstructed for two or three years, when W. sold said estate, which was afterwards conveyed to S., who, in 1841, wholly obstructed the entrance of light and air through said window, and cut off the eaves of said house, by building up a brick wall on the line of his (S.'s) land; and E. brought an action against him to recover damages therefor. *Held*, that the easements reserved in the deed from B.'s administrator to D. were not extinguished, renounced or abandoned, by the license given by B.'s widow, and the acts of D. & W. *Held also*, that the reservation in the deed from D.'s devisees to I. precluded S., who was privy in estate with I., from setting up said license. *Held also*, that the reservation, in the deed of B.'s administrator to D., of the right of keeping open the window, was merely a right then existing, to wit, the right to light and air coming from the space of twenty five inches between the window and the line of D.'s land, as it stood before that deed was given, and that E. was not entitled to recover damages of S. for any obstruction of the light and air by an erection on the original line of D.'s land. *Ib.*

See COVENANT, 4.

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EMBEZZLEMENT.

See INDICTMENT, 6. 7. LARCENY, 3.

EQUITY.

When an assignee of an insolvent debtor files a bill in equity, praying that the defendant, to whom such debtor has mortgaged land for the purpose of giving an illegal preference, may be ordered to give up the mortgage or convey the land to the assignee, but waiving all claim to a discovery from the defendant, or to an answer on oath, and relying wholly on proofs within the plaintiff's own power, the bill shows that the plaintiff has a plain, adequate and complete remedy at law, by a writ of entry, and that the court have no jurisdiction in equity. *Thayer* v. *Smith*, 469.

See INSOLVENT DEBTORS, 2.

EVIDENCE.

1. If a party who is indicted on the Rev. Sts. c. 4, § 6, for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, admits, on his trial, that he voted at the election, it is equivalent to an admission that he voted wilfully. *Commonwealth* v. *Bradford*, 268.
2. On the trial of a party indicted for wilfully giving in a vote at an election, knowing himself not to be a qualified voter, when the only question is, whether he had resided in the town where he voted six months next preceding the election, evidence that he had resided in another town until within seven months of the election does not put upon him the burden of showing that he had changed his residence, but the burden of proof to support the indictment remains on the Commonwealth. *Ib.*
3. Evidence that a party consulted counsel as to his right to vote, and submitted to them the facts of his case, and was advised by them that he had the right, is admissible in his favor, on the trial of an indictment against him for wilfully voting, knowing himself not to be a qualified voter, but is not conclusive evidence that he did not know that he was not a qualified voter. *Ib.*
4. A tenant in a writ of entry may give in evidence, for the purpose of disproving the demandant's seizin, a deed of the demanded premises, given to a third person by the ancestor under whom the demandant claims title. *Hall* v. *Stevens*, 418.
5. When a party's first entry upon land, and his occupation thereof, were by permission of the owner, the legal presumption is, that his subsequent occupation was also permissive, and not adverse, unless some act of his is proved which constitutes a disseizin of the owner. *Ib.*
6. A party's admissions of particular facts are receivable in evidence against him, though they were made while he was negotiating for a compromise. *Dickinson* v. *Dickinson*, 471.
7. In the trial of an action of trover, evidence was received that the defendant, while negotiating with the plaintiff for a compromise of the suit, admitted that he had sold the property in question, and that the plaintiff had demanded it of him, and that the plaintiff then said to him, "I suppose

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you would do better by me than you offered yesterday." *Held*, that these admissions of the defendant were properly received, and that though the words spoken by the plaintiff, if they had been unconnected with the other conversation of the parties, would have been inadmissible, yet that they were not, when taken in connexion with that other conversation, so objectionable as to require that the verdict for the plaintiff should be set aside. *Ib.*

8 A promissory note may be given in evidence, on the money counts, in a suit by the indorsee against the promisor; *Goodwin* v. *Morse*, 278; and in an action by the payee against the promisor, as well when the action is defended by subsequent attaching creditors, as when it is defended by the promisor himself. *Moore* v. *Moore*, 417.

9. A. borrowed money of an insurance company, and gave an unconditional promissory note therefor, payable in twelve months to the order of B., who, at the same time, indorsed it to the company for the accommodation of A. *Held*, in a suit on the note, brought by the company against B., that he could not give in evidence, by way of defence, an oral agreement between himself, the company and A., made when the note was given and indorsed, that such sum as should be found justly due from the company to A. on a certain policy of insurance made by them to him, should be set off and applied in or towards the satisfaction of the note. *St. Louis Perpetual Ins. Company* v. *Homer*, 39.

10. In a suit against surviving partners, to recover the amount of a note given by the deceased partner in his single name, his declarations that the transactions for which the note was given were for the partnership business, and that it was a company note, are not admissible in evidence, if there be no evidence *aliunde* that those transactions were for the partnership. *Ostrom* v. *Jacobs*, 454.

11. Nor is evidence admissible, in such suit, that one of the surviving partners, after the death of the partner who signed the note, recognized the note as one which the firm were bound to pay, and attempted to borrow money to pay it, and offered to take it up and give the note of the survivors in lieu of it, if it be not shown that this was known or consented to by the other survivor. *Ib.*

12. When, in such suit, there is no evidence that the surviving partners, before the death of the other partner, had knowledge of, or gave consent to, his giving notes in his own name alone for the debts of the firm; and there is evidence that he, when he gave such notes, charged the amount thereof against the firm, as cash; and also evidence that the plaintiff knew of the partnership, and made charges against the firm, in other cases; the declarations of the deceased partner, when he borrowed the money for which the note was given, are not admissible in evidence against the survivors. *Ib.*

13. When two persons jointly, or jointly and severally, sign an obligation for the payment of money, one of them may show, by evidence *aliunde*, that he was surety for the other. *Carpenter* v. *King*, 511.

14. In an action of debt on judgment, brought against a surviving judgment debtor, who signed the obligation on which the judgment was rendered, jointly or jointly and severally with the other judgment debtor, he may

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show, by evidence *aliunde*, that he signed that obligation as surety for the other debtor. *Ib.*

15. And in such action, the defendant may prove that the plaintiff informed him that the judgment was paid by the principal, and that the defendant thereupon relinquished security which the principal had given him; and such proof will establish a good defence to the action, though the plaintiff did not intend to mislead or deceive the defendant. *Ib.*

16. A., B., C. and D. signed a promissory note, and the word "surety" was added to the names of C. and D. only: D. paid the note, and sued A. and B. jointly, to recover the amount paid by him. *Held*, that B. might prove, by parol evidence, that he signed the note as surety for A.; and that, upon such proof, D. could not maintain such joint action, although D., when he signed the note, did not know that B. was surety for A. *M'Gee* v. *Prouty*, 547.

17. A., for his own use and benefit, brought a writ of entry against B. in the name of C., and recovered judgment for possession of the premises demanded: B. afterwards brought a writ of entry against A., to recover possession of premises adjoining those which had been thus recovered from him, claiming part of them under the same title by which he attempted to defend against the former suit, and part of them under a different title. *Held*, that the judgment recovered by A., in the former suit, was not conclusive evidence in his favor, in the latter suit, although the proof was the same in both suits. *Piper* v. *Richardson*, 155.

See BANK, 3. BANKRUPT, 2. DAMAGES, 2. INSOLVENT DEBTORS, 6 INSURANCE, 5. LARCENY, 3. LIMITATIONS, 2. 3. PILOT, &c. 4.

EXCEPTIONS.

By St. 1840, c. 87, §§ 4, 5, the instructions given to a jury by the court of common pleas, in the trial of an issue joined on a rejoinder to a replication to a plea in abatement, are not the subject of a bill of exceptions. *Sawyer* v. *Pratt*, 170.

EXECUTION.

1. An execution may be legally issued on a judgment, though an action on the judgment is pending. *Cushing* v. *Arnold*, 23.

2. When the real estate of an insolvent debtor is seized on execution, before the first publication of a messenger's notice that a warrant under St. 1838, c. 163, has issued against such debtor's estate, the judgment creditor will hold the estate so seized, if the levy thereon be afterwards duly completed, though it be not completed until after such publication. *Ib.*

3. The requisitions of the Rev. Sts. c. 73, § 23, that an officer, in the return of his doings in the levy of an execution on land, shall set forth the time when the premises were taken on execution, and that the appraisers appraised and set them off, are sufficiently complied with, if the officer states that, on a day named, he caused three discreet and disinterested freeholders of the county to be sworn faithfully and impartially to appraise

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certain real estate, that they having appraised it on oath, at a certain sum he delivered possession and seizin thereof to the judgment creditor's attorney, and left said attorney in quiet possession thereof. *Childs* v. *Barrows*, 413.

4. A return of a levy of an execution on land is sufficient, if it state the day of the taking, without mention of the hour and minute; and it is also sufficient, if it set forth acts which constitute a taking, without expressly averring it. *Cowls* v. *Hastings*, 476.

5. An officer, under date of September 25th, made a return on an execution, stating that he, pursuant to said execution, had caused three discreet and disinterested freeholders of the county to be sworn, as appeared in the magistrate's certificate, and that they afterwards viewed the land described in their certificate of appraisement, and that he extended the execution on said land, and delivered seizin and possession thereof to the execution creditor: He also made the certificates of the magistrate and of the appraisers a part of his return: The certificate of the magistrate was, that the appraisers were sworn before him on the 16th of October: The certificate of the appraisers was dated September 25th, and stated that they, having been first sworn, viewed the land and appraised it. *Held*, that it sufficiently appeared from the return, 1st, that the appraisers were sworn before they viewed and appraised the land, and 2d, that the officer took the land, on the execution, on the 25th of September; and that the levy was valid. *Ib.*

See CONDITION. EXECUTOR, &c. 2. 3.

EXECUTOR AND ADMINISTRATOR.

1. A testator appointed A. & B. his executors, and gave to his nephews all his property that should remain after payment of his debts, &c.: He also appointed B. trustee of said remaining property, empowering him to take possession thereof, and directing him to invest it on good security on interest, until he should have occasion to make payment according to the further provisions of the will, viz. to pay it to the testator's nephews, in equal shares, as they should respectively come of age: A. & B. rendered an administration account, and the balance was retained in the sole possession of B., who gave no bond, as trustee: No further administration account was rendered by A. & B.: B. rendered a separate account, and a decree was thereupon passed that he should pay the balance thereof to the testator's nephews, according to the directions of the will; but B. failed to perform this decree. *Held*, in a suit on the bond given by A. & B., as executors, that they were jointly answerable for the testator's property, and that they and their sureties were liable for the amount of the distributive shares of the testator's nephews. *Newcomb* v. *Williams*, 525.

2. Under Rev. Sts. c. 70, a legatee cannot put in suit, for his own benefit, the executor's administration bond, and have execution awarded for his own use. *Ib.*

3. In all cases of suits on administration bonds, except those mentioned in Rev. Sts. c. 70, §§ 3, 4, 5, execution is to be awarded, without expressing that it is for the use of any particular person; and all money received on

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any execution so awarded is to be paid, as directed by § 11, viz. to the co-executor or co-administrator, if there be any, or to whoever shall then be the rightful executor or administrator; and the money so paid will be assets, in his hands, to be administered according to law. *Ib.*

4. When an executor, who is unfit to be such, is sued on his administration bond, in a case in which execution is to issue without expressing that it is for the use of any particular person, the judge of probate should remove him, and appoint an administrator *de bonis non*, with the will annexed, who will be entitled to the money that may be received on such execution. *Ib.*

5. A testator whose estate was insolvent, after giving to his wife certain real estate for life, and certain legacies to others, appointed W. his executor, to whom he made the following residuary devise and bequest: "I give to my son W., to hold to him and his heirs forever, all the rest and residue of my real and personal estate, subject to the following liens, payments and charges: *First*, the payment of all debts that I may owe at my decease, and all funeral charges, and the erection of a suitable monument at my grave; *second*, to pay to my three daughters, A., B. and C., each, and to D., wife of J. B., the sum of $70; the aforesaid liens and payments to be made, one half in two years and one half in three years from my decease, with interest from that event:" W. entered upon the real estate so devised to him, and occupied it two years, either in person or by his lessees, and took notes from his lessees, for the rent, payable to himself, as executor. *Held*, that W. was not liable to account, as executor, for any part of said rents and profits. *Newcomb* v. *Stebbins*, 540.

6. When an executor or administrator, pursuant to the Rev. Sts. c. 66, presents to the judge of probate an account between himself and the deceased, and claims a balance as a debt due to him from the deceased, which claim, being disputed, is examined and allowed by the judge, without being submitted to an arbitrator, and parties interested in the deceased's estate appeal to the supreme judicial court, the appeal opens the whole account, and the appellate court has authority, if neither party requests to have the claim submitted to a jury, to decide on the claim, and to decree that there is a balance due from the executor to the deceased's estate. *Willey* v *Thompson*, 359.

7. An administrator of an insolvent estate can defend a suit brought against him for a debt due from his intestate, only by showing an account of administration settled in the probate court, under Rev. Sts. c. 66, or by regular proceedings in insolvency, under Rev. Sts. c. 68. *Cushing* v. *Field*, 180.

See Costs, 3. Partnership, 2. Set-off, 2. Trover, 2. Trust, &c. Will, 1, 2.

EXTINGUISHMENT.

See Bottomry. Easement, 1. 4.

FANUEIL HALL MARKET.

See By-law.

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FLATS.

The decision in *Valentine* v. *Piper*, 22 Pick. 85, recognized and confirmed viz. that the lines dividing the flats appurtenant to the upland lots lying southerly of Summer Street, in Boston, are to run parallel with the lines of that street. *Piper* v. *Richardson*, 155.

FRAUDS, STATUTE OF.

A. asked B. what he would take for candles; B. said he would take twenty one cents per pound; A. said he would take one hundred boxes; B. said the candles were not manufactured, but he would manufacture and deliver them in the course of the summer: No written memorandum was made of this bargain. *Held*, that this was a contract for the sale of goods, within the statute of frauds — Rev. Sts. c. 74, § 4. *Gardner* v. *Joy*, 177.

FRAUDULENT CONVEYANCE.

See Insolvent Debtors, 4. 5.

GAMING.

See Unlawful Game.

GIFT.

A gift of a chattel, accompanied by delivery to the donee, passes the property, as against the donor and his heirs. *Fuxon* v. *Durant*, 399.

See Larceny 1.

GOODS SOLD AND DELIVERED.

See Guaranty. Principal and Agent.

GRANT.

See Rail Road Corporation.

GUARANTY.

A. subscribed this instrument: "I guaranty the payment of the amount of a bill of merchandize, purchased of C. by B.," on a former day, "and of all further sums which B. may owe C. for goods which he may sell B. on six months' credit, provided that the whole amount, which B. shall owe C. at one time, shall not exceed $2000; it being the understanding, that I am in no event to be liable for more than that sum: And in case said B. shall fail punctually to pay said C. any sum which may become due to him, I am to have ninety days, after demand in writing is made on me under this guaranty, to pay the amount for which he may be so in default, with interest: And this guaranty is upon the condition that said C. shall, once in every eight months from the date hereof, give me notice, in writing, of the state of said B.'s account with him:" C. took B.'s negotiable note, for the merchandize sold to him before the date of the above guaranty, dated on the

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day of the sale thereof, payable in six months, and also a like note of B. for the amount of one other bill of merchandize afterwards sold to him; but these notes were not negotiated: B. bought other merchandize of C., at different times, on six months' credit, but failed to pay even the amount of his first note: C. sent to A. a copy of B.'s account, in which all the items of debit and credit, up to the time it was so sent, were stated, including some charges for which A. was not liable, and gave A. written notice, at the same time, that said copy was sent in conformity to one of the conditions of the guaranty: C. afterwards sent a letter to A., giving notice that B. had failed to pay for the goods sold to him on the strength of the guaranty, demanding payment of A., and stating that his account against B. had been previously sent to A.: After the expiration of ninety days from the delivery of this letter, C. commenced an action against A., on the guaranty. *Held*, that the taking of B.'s notes by C. did not discharge A. from liability to pay for the merchandize for which the notes were given. *Held also*, that A. had sufficient notice of B.'s account with C., and of the amount for which B. was in default, and of the items for which A. was liable on the guaranty *Curtis* v. *Hubbard*, 322.

GUARDIAN.

See COVENANT, 2.

HIGHWAY

See SURVEYOR. WAY.

INCOME.

See TAXES, 2. 4.

INDICTMENT.

1. In an indictment on the Rev. Sts. c. 47, § 2, it is not necessary to allege that the defendant sold spiritous liquor in his dwelling-house or other building. *Commonwealth* v. *Stowell*, 569.
2. When an indictment on the Rev. Sts. c. 47, § 2, alleges that the defendant "sold to C. spiritous liquor, to be used in his dwelling-house," it shall be construed to be the dwelling-house of the defendant. *Ib.*
3. An indictment alleged that the defendant, on a certain day, "presumed to be a seller of wine, brandy, rum and other spiritous liquors, to be used in and about his house, without being first licensed as an innholder or common victualler, with authority to sell spiritous liquor, and did then and there sell to one C. one half gill of spiritous liquor, to be used in and about his dwelling-house, without being first duly licensed as an innholder or common victualler, with authority to sell spiritous liquors." *Held*, that this indictment was not bad for duplicity; that there was no sufficient charge against the defendant as a common seller, and therefore that the words, which alleged that he presumed to be such seller, might be rejected as surplusage; and that the remaining allegations constituted a sufficient indictment for a single sale. *Ib*

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4. An indictment on the Rev. Sts. c. 47, alleged that B., on the 30th of April 1844, *and on divers others days and times between the 1st of January and the first Monday of May* 1844, *did presume to be and was a retailer and seller of spiritous liquor, in a less quantity than twenty eight gallons*, &c., without being duly first licensed as a retailer of wine and spirits, as is provided by law, and did then and there sell and retail spiritous liquor to J. C. in a quantity less than twenty eight gallons, &c. to wit, in the quantity of half a pint. *Held*, that the words in italics might be rejected as surplusage, and that the remaining words sufficiently alleged a single act of selling spiritous liquor, by the defendant, without license. *Commonwealth* v. *Bryden*, 137.

5. An indictment for larceny must state the value of the articles alleged to be stolen; and if it alleges the stealing of various articles, but states only the collective value of the whole of them, and the jury find the defendant guilty of stealing only a part of them, no judgment can be legally rendered against him. *Hope* v. *Commonwealth*, 134.

6. An indictment which alleges that the defendant did "embezzle, steal, take and carry away," certain goods, is not bad for duplicity, as charging the two offences of embezzlement and larceny: The word "embezzle" will be rejected as surplusage, and the indictment be regarded as charging a larceny only. *Commonwealth* v. *Simpson*, 138.

7. In order to warrant the admission of evidence that an indicted party has embezzled money or goods, the indictment must allege matter sufficient to appraise him that he is charged with embezzlement. *Ib.*

8. In an indictment on the Rev. Sts. c. 50, § 17, for suffering persons to resort to a house, &c., for the purpose of playing at an unlawful game, it is sufficient to allege that the defendant did, for hire, gain and reward, permit persons to resort, &c., for the purpose of playing at a certain unlawful game mentioned, without alleging that persons actually did resort there for the purpose of playing, or did there play, at any unlawful game. *Commonwealth* v. *Stowell*, 572.

INFANT.

1. If an infant buys goods on credit, and retains them in his own hands and uses them for his own purposes, for an unreasonable time after he comes of age, without restoring them to the seller, or giving him notice of an intention to avoid the contract, it operates as a ratification of the contract, and renders the buyer liable in an action for the price of the goods. *Boyden* v. *Boyden*, 519.

2. When a minor makes a contract, either absolute or conditional, to labor for a year, for $100, and his employer, without sufficient cause, discharges him before the year expires, indebitatus assumpsit may be maintained for the minor's wages for the time during which he labored; and his employer is bound to pay at the rate of $100 a year, deducting any loss that he may have sustained from the minor's unfaithfulness, or occasional absence without leave. *Moulton* v. *Trask*, 577.

See MANUFACTURING CORPORATION.

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day of the sale thereof, payable in six months, and also a like note of B. for the amount of one other bill of merchandize afterwards sold to him; but these notes were not negotiated: B. bought other merchandize of C., at different times, on six months' credit, but failed to pay even the amount of his first note: C. sent to A. a copy of B.'s account, in which all the items of debit and credit, up to the time it was so sent, were stated, including some charges for which A. was not liable, and gave A. written notice, at the same time, that said copy was sent in conformity to one of the conditions of the guaranty: C. afterwards sent a letter to A., giving notice that B. had failed to pay for the goods sold to him on the strength of the guaranty, demanding payment of A., and stating that his account against B. had been previously sent to A.: After the expiration of ninety days from the delivery of this letter, C. commenced an action against A., on the guaranty. *Held*, that the taking of B.'s notes by C. did not discharge A. from liability to pay for the merchandize for which the notes were given. *Held also*, that A. had sufficient notice of B.'s account with C., and of the amount for which B. was in default, and of the items for which A. was liable on the guaranty *Curtis* v. *Hubbard*, 322.

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1. If an infant buys goods on credit, and retains them in his own uses them for his own purposes, for an unreasonable time, after he is of age, without giving them to the seller, or giving him information to that effect, or otherwise disaffirming the contract, it operates as a ratification and renders him liable in an action for the price. *Goode* v. *Harrison*, 5 B. & Ald. 147. *Boyden* v. *Boyden*, 9 Metc. 519. But he is not liable for any loss, if

2. When a contract, either for a year, or for his employer, without specifying any time, that, if the servant before the end of the year, or other time, he should forfeit wages, the underminor time during which he should serve, of the prior instalments of wages, or any part of the risk, remains in force, and is not cancelled by agreement between the former and the latter underwriters,

owners of whale ships and

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INSOLVENT DEBTORS.

1. While the United States bankrupt act of 1841 was in force, proceedings against a debtor, under the insolvent law of the State, were unauthorized and void, if the debtor and his property were subject to the operation of that bankrupt act, although no proceedings under it were had against him. *Griswold* v. *Pratt*, 16.

2. An application to the court for the exercise of the chancery powers conferred by *St.* 1838, *c.* 163, § 18, in cases arising under that statute, must be by bill, petition, or other proceeding in chancery: In a writ of entry brought by an assignee of an insolvent debtor to try the title to land set off on an execution against the debtor, the rights of the parties are to be determined upon strict principles of law. *Cushing* v. *Arnold*, 23.

3. Under *St.* 1838, *c.* 163, § 4, an appeal from a decision of a judge of probate or master in chancery, rejecting a claim against the estate of an insolvent debtor, cannot be taken to the supreme judicial court, unless the debt demanded exceeds the sum of $300 on the day of the first publication of notice, by the messenger, that a warrant has issued against the debtor. *Whiting* v. *Gray*, 291.

4. A "fraudulent conveyance," which, by *St.* 1844, *c.* 178, § 9, is made a cause for proceeding against an insolvent debtor under *St.* 1838, *c.* 163, includes not only a conveyance which, by the common law and the *Sts.* of Elizabeth, is fraudulent and void as to creditors, but also a conveyance made with intent to give a preference to a preëxisting creditor, which is made void, as to the other creditors, by *St.* 1841, *c.* 124, § 3. *Ex parte Jordan*, 292.

5. To authorize the issuing of a warrant, under *St.* 1844, *c.* 178, to seize the estate of a debtor, on the ground of his having made a fraudulent convey ance by way of preference, it must be shown, 1st, that the debtor was insolvent, or contemplated proceedings in insolvency, at the time of making the conveyance, and that he made it with a view of giving a preference to a preëxisting creditor; 2d, that he then had no reasonable cause to believe himself solvent; and 3d, that the creditor, at the time of receiving the conveyance, had reasonable cause to believe the debtor was insolvent: And the burden of proving the first and third of these propositions is on the creditor who petitions for the issuing of the warrant. *Ib.*

6. The allegations in a petition for the issuing of a warrant to seize the estate of a debtor, under the insolvent laws, though made on oath, as required by *St.* 1844, *c.* 178, § 9, are not to be received as evidence, on the hearing of the petition; nor can the debtor be called upon to testify, without his consent, on the preliminary question, whether he shall be adjudged an insolvent. *Ib.*

The provision in *St.* 1844, *c.* 178, § 9, that notice shall be given to a party, and that he shall have an opportunity to be heard, before a warrant is issued, on the petition of his creditor, to seize his property as that of an insolvent debtor, applies not only to a petition that sets forth any of the causes for such warrant which are enumerated in that statute, but also to a petition which sets forth any of the causes which are enumerated in the previous *St.* of 1838, *c.* 163. *Buck* v. *Sayles*, 459.

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8. The provisions of St. 1844, c. 178, § 1, apply to proceedings in insolvency which were pending when it went into operation. *Eddy* v. *Ames*, 585.
9. Since St. 1844, c. 178, went into operation, a discharge of an insolvent debtor is void, if granted by a judge of probate, or master in chancery, at a court not held on the second Monday of a month, or by adjournment, from day to day, of a court held on such Monday. *Ib.*

See ASSUMPSIT, 3. EQUITY. EXECUTION, 2.

INSOLVENT ESTATES.

See EXECUTOR, &c. 5. 7.

INSURANCE.

1 A fire insurance company executed a policy insuring a three story brick building, called the Central Exchange, which was afterwards burned: A by-law of the company, attached to the policy when it issued, was in these words: "All policies, which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues:" On the policy, when it issued, was this memorandum: "Five thousand dollars insured by the Worcester Mutual Fire Insurance Company:" The prior insurance was, in fact, $4700 on the three story brick building and a two story wooden building connected therewith, which were called the Central Exchange, and $300 on a barn near the same. *Held*, in a suit on the second policy, that though a compliance with the said by-law was a condition precedent to the validity of the policy, yet that the said memorandum of the prior insurance was a sufficient compliance with the by-law, and that the defendants were liable on their policy. *Liscom* v. *Boston Mutual Fire Ins. Co.* 205.
2. The law of marine insurance respecting salvage does not apply to a fire policy issued by a mutual fire insurance company: On such a policy, the assured is entitled to recover the amount of his insurance, when the insured building is destroyed, without deducting the value of the materials which remain. *Ib.*
3. When underwriters insure the cargo and catchings on board a ship, on a whaling voyage, a letter seasonably written to them by the assured, informing them that the ship is lost by stranding, and tendering an abandonment to them of the interest in the cargo, so far as it has been insured by them, is such an abandonment as entitles the assured to recover for a total loss, if such loss is sustained. *Macy* v. *Whaling Ins. Co.* 354.
4. A provision, in a policy of insurance on cargo and catchings, that, if the assured shall have made any prior insurance on the catchings, the underwriters shall be answerable only for so much as the amount of the prior insurance is deficient towards fully covering the property at risk, remains in force after a prior policy, effecting such insurance, is cancelled by agreement of the parties thereto, without the consent of the latter underwriters, although it is cancelled before any loss occurs. *Ib.*
5. Evidence is admissible to prove a usage, among owners of whale ships and

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underwriters, to treat a policy of insurance on outfits as covering one quarter part of the catchings. *Ib.*

INTEREST.

1. When a part owner of a vessel has a running account with a shipwright who works thereon, and the balance, on settlement, is in favor of such owner, and he receives the shipwright's note for the balance, no interest being charged on either side of the account, and it not appearing that such owner ever paid any money to the shipwright; such owner, in a suit against the other owner for contribution, is not entitled to interest on his account against the shipwright, previously to the time of the settlement of their accounts. But when such part owner gives his notes to the shipwright, payable, with interest, after six months from the times when the work was done, and they are received in discharge of the bills for the work, he is entitled to recover interest of the other owner from the time when such notes became payable, though he did not enter those bills on his book till long afterwards. *Winsor* v. *Savage*, 346.
2. When one of two joint owners of vessels and cargoes takes charge of the vessels and their outfits and repairs, and the other attends to the providing of the cargoes and settling for them, and they agree that interest shall be cast on their accounts, the neglect of one of them, for a long time, to render his accounts to the other, though frequently requested, does not deprive him of the right to interest on his accounts, when afterwards rendered. *Ib.*

JUDGMENT.

See EVIDENCE, 14. 17. EXECUTION, 1.

JUROR.

See NEW TRIAL.

LARCENY.

1. A memorandum book, kept by a person who works for a tailor by the piece, and in which entries are made of the names of the persons owning the garments worked upon, and the prices of the work, is a "book of accounts for or concerning money or goods due, or to become due, or to be delivered," within the Rev. Sts. *c.* 126, § 17, and is the subject of larceny: And such book, given by a tailor to the person who works for him, for the purpose of such entries being made therein, is the property of such person, and not of the tailor. *Commonwealth* v. *Williams*, 273.
2. A certificate, given to A. by B., whom C. had promised to pay for work, stating that A. has paid for the work, and that B. has no claim therefor on C., is a "receipt or release," within the Rev. Sts. *c.* 126, § 17, and is the subject of larceny. *Ib.*
3. Evidence of embezzlement will not support an indictment for mere larceny, although the Rev. Sts. *c.* 126, declare that a party who embezzles

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money or goods shall be deemed, by so doing, to have committed the crime of larceny. *Commonwealth* v. *Simpson*, 138.

See INDICTMENT, 7.

LEGACY AND LEGATEE.

See CHARITABLE USES. EXECUTOR, &c. 1. 2. WILL.

LETTER OF CREDIT.

See BILL OF EXCHANGE, 2. PARTNERSHIP, 1.

LIBEL.

1 Malice, in the publisher of a libel, does not imply personal ill will towards the person libelled. *Commonwealth* v. *Bonner*, 410.

2. Under the Rev. Sts. c. 133, § 6, which permit a defendant, who is indicted for a libel, to give in evidence the truth of the matter charged as libellous, but provide that such evidence shall not be deemed a justification, unless it be made to appear that such matter was published with good motives, and for justifiable ends, the burden is on the defendant, not only to prove the truth of the matter so charged, but also that it was published with good motives and for justifiable ends. *Ib.*

LICENSE.

See EASEMENT, 2. 4. RAIL ROAD CORPORATION.

LIMITATIONS, STATUTE OF.

1. The cause of action against a sheriff, for the taking of insufficient bail by his deputy, accrues on the return of *non est inventus* upon the execution against the principal; and the statute of limitations begins to run from that time. *West* v. *Rice*, 564.

2. In a suit by the payee against the maker of a promissory note, if the defendant relies on the statute of limitations, and the plaintiff relies on a payment by the defendant within six years, the plaintiff may introduce parol evidence of a receipt given by him to the defendant for money paid on the note, although it appears that the defendant returned the receipt to him upon his indorsing the amount thereof upon the note. *Williams* v. *Gridley*, 482.

3. An oral admission by a defendant that he has made a payment on the demand in suit, within six years next before the suit was commenced, is competent evidence to take the case out of the statute of limitations — Rev. Sts. c. 120, § 17. *Ib.*

See ALIEN. BANK, 1.

MALICE.

See LIBEL, 1.

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MANUFACTURING CORPORATION.

A corporation is not liable to the penalty imposed, by St. 1842, c. 60, § 3, on the owner, agent or superintendent of a manufacturing establishment, for employing children under the age of twelve years, in laboring more than ten hours in a day in such establishment. *Benson* v. *Monson and Brimfield Manuf. Co.* 562.

MONEY HAD AND RECEIVED.

See Assumpsit, 3.

MONEY PAID.

See Assumpsit, 2.

MORTGAGE.

See Damages, 1. Bottomry, 2.

MURDER.

When, on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant. Wilde, J. dissenting. *Commonwealth* v. *York*, 93.

NEW TRIAL.

A defendant, who is found guilty, on the trial of an indictment, is not entitled to a new trial on the ground that a juror was taken from the panel, on the erroneous supposition that there was good cause to challenge him, and another juror substituted, if the defendant did not object at the time. *Commonwealth* v. *Stowell*, 572.

NOTICE.

See Guaranty. Insolvent Debtors, 7. Paupers, 1. Poor Debtors, 1 Promissory Note, 2–4. Way. 4. 5.

PARTNERSHIP.

1. C. was a joint owner with H. & Co. of the barque Roman, but not a partner in their general business: H. & Co. projected a voyage for the barque, in which they were to be interested in part, and P., as supercargo, in part and C. afterwards agreed with H. & Co. to be interested in one fourth of their part: H. & Co. obtained a letter of credit from B. & Co., of London, through W., their agent in Boston, authorizing P. to value on them, at port or ports in South America, for account of H. & Co. and P., for the cost of any shipments of merchandize made for their joint account, on board the

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barque Roman, for any sum not exceeding £20,000 sterling, if drawn within six months from date, and if accompanied by bills of lading and invoices of such shipments, consigned to the order of B. & Co.; and H. & Co., at the same time, in their names only, signed an agreement to provide, in London, sufficient funds to meet the payment of whatever bills might be negotiated by virtue of said letter: When this letter was procured, W. was informed by H. & Co. that C. was interested in the credit and in the voyage: The barque proceeded on her voyage, under written instructions from H. & Co. to P., given with the knowledge of C., recommending that P. should give a decided preference to a hide voyage from South America to Amsterdam, but giving him the entire control of the barque, to go with her, or send her, where he pleased: The barque arrived in South America after the expiration of six months from the date of the letter of credit; and P. finding it difficult to procure hides, loaded the barque with coffee, and proceeded with her to Trieste, consigning the cargo to the order of B. & Co. to whom he forwarded an invoice and bill of lading: To pay for the coffee, P. drew two bills on B. & Co., on different days, one for £10,000, and the other for £7,000, and forwarded advices to H. & Co., who received them after they had suspended payment and assigned their property to C. for the use of their creditors: C. immediately made to H. & Co. a written disclaimer of all interest in the voyage of the barque, denying P.'s authority to purchase the coffee or draw the bills on B. & Co.: H. & Co. ratified P.'s doings, and wrote to B. & Co., urging them to protect the bills drawn by P., but did not give them notice of C.'s disclaimer: The bill for £10,000 was accepted by B. & Co. for the joint account of H. & Co. and P., and the bill for £7,000 was afterwards accepted and paid by them, *supra protest*, for the honor of P., the drawer; and they drew on the consignee of the coffee at Trieste for the amount of those bills, and received that amount from him: The proceeds of the coffee fell $21,000 short of said bills, and the consignee redrew on B. & Co. for that sum: In the mean time P. failed, and his property was assigned, under the insolvent law of Massachusetts: B. & Co. presented a claim for said $21,000 against the insolvent estates of H. & Co. and P., and received dividends thereon: The name of C. did not appear in the books of B. & Co., nor in their correspondence with H. & Co., on the subject of the bills and the cargo of coffee: B. & Co. brought an action against C. to recover the residue of the $21,000.

Held, that C. was liable to third persons, as a partner of H. & Co. and P., for all contracts made, in the prosecution of the voyage of the barque, by H. & Co., as superintendents of the voyage, and by P. as supercargo, it made within the scope of their authority, although no name, firm, or special designation, was adopted, to distinguish such contracts from the general business done in the name of H. & Co. *Held also*, that P., in drawing the bills on B. & Co., though they were not drawn on the faith of the letter of credit which had expired, acted within the scope of his authority to conduct the voyage and make all contracts incident to its promotion. *Held also* that C.'s disclaimer to H. & Co., after the purchase of the coffee and the drawing of the bills by P., had no effect on the rights of B & Co., C. hav

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ing no authority to revoke the authority of P., after it was executed. *Held also*, that B. & Co., by keeping their books and stating their accounts in the name of H. & Co. only, had not exonerated C. from his liability to them, nor manifested an intention to waive their claim upon him. *Held also*, that C. was liable, as well for the money paid by B. & Co. on the £7,000 bill, as on the other bill, and that they were entitled to judgment against C. for the full amount of the claim made on him. *Baring* v. *Crafts*, 380.

2. The firm of T. & W. were also partners in the firm of P. & Co.: The members of the firm of P. & Co. were incorporated by the name of the Wareham Iron Company, but gave no notice of the dissolution of their partnership, and continued to do business under the name of P. & Co., and became largely indebted to G.: Said company failed, and made an assignment of all their property to T. & W., in trust, *first*, to pay them, in full, all that the company owed them, and to indemnify them, in full, against all their liabilities for the company; and *secondly*, to appropriate the residue to the payment, *pro rata*, of the other creditors of the company, who should execute the assignment; and this assignment was executed by most of the creditors: W. afterwards died, leaving a will in which T. was appointed one of his executors: Subsequently, G., who had not become a party to said assignment, sued T., as surviving partner of W., for the debt due from said company to G., and recovered judgment, on the ground that he had no notice, when the debt was contracted, of the dissolution of the firm of P. & Co., of which T. & W. were members: T. paid $29,000 in satisfaction of said judgment, and presented to the judge of probate a claim against the estate of W., his testator, of one half of the sum so paid by him to G.: This claim was disputed by the widow and heirs of W.; on the hearing, it appeared that T., when he so paid G., had in his hands, as surviving assignee of said company, property sufficient to pay all that the company owed T. & W., and also to indemnify him against G.'s judgment. *Held*, that T.'s claim could not legally be allowed; and that he should have charged the amount thereof to the trust fund under the assignment, although he omitted so to do, and charged it to the partnership fund, for the purpose of quieting the company's creditors, who were not preferred by the assignment, and from an apprehension that, if he did not, they might attempt, as G. had, to recover from him their full demands against the company. *Willey* v *Thompson*, 329.

See EVIDENCE, 10–12.

PAUPERS.

1. The town of D., on receiving notice from the town of P. that certain paupers, whose settlement P. alleged to be in D., were supported in P., immediately paid the expense that had been incurred by P. for their support, removed part of the paupers to D., and made provision for the support of the others in P. for the term of about forty days: Within two months from the time of receiving said notice from P., the overseers of the poor of D. replied to that notice, denying that D. was liable to support said paupers, and re-

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fusing to pay P. for any further support of them. *Held*, that the town of P. could not maintain an action against the town of D. for the subsequent support of said paupers, without first giving D. a new notice. *Inhabitants of Palmer* v. *Inhabitants of Dana*, 587.

2. The provision in the Rev. Sts. c. 46, § 18, that "every town shall be held to pay any expense which shall be necessarily incurred, for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of the said town, and until provision shall be made by them," applies only to expense incurred in the support of a pauper found or residing in the town. *Smith* v. *Inhabitants of Colerain*, 492.

3. A. agreed with the town of C. to support two of its paupers, for one year, for a certain sum, and removed them into an adjoining town, where they were supported, during the year, at his charge, in the family of their son in law: At the end of the year, the town agreed with B. to support its paupers, for a year, for a certain sum: The said two paupers afterwards remained in the adjoining town, in the family of their son in law, who was requested by A. to support them, at his charge, until they should be removed to the town of C.: A. also gave notice to the overseers of the town of C. that said paupers were on his hands and requested the overseers to provide for them: No provision was made for said paupers by the overseers, and they were supported by their son in law, at A.'s charge. *Held*, that the town of C. was not bound to pay to A. the expense incurred by him, after the first year, for the relief of these paupers. *Ib.*

PAYMENT.

See Assumpsit, 2. Bill of Exchange, 1. Limitations, 2. 3. Promissory Note, 6. 7.

PILOT AND PILOTAGE.

1. By the Rev. Sts. c. 32, the pilotage district, which includes the harbor of Boston, extends from Nahant Rock, on the north, to the highlands of Marshfield, on the south; and the words "port of Boston," or "harbor of Boston," as used in reference to the regulation of pilotage, include all the ports which use the several channels leading to the city of Boston, and the mouths of the rivers which enter into that harbor. *Martin* v. *Hilton*, 371.

2. *It seems*, that it is the duty of the pilots for the harbor of Boston to take charge of a vessel which is subject to the pilotage laws, as well when such vessel is bound to Weymouth, Dorchester, Cambridge, or Charlestown, as when bound to Boston; and that they are entitled to their fees, when they seasonably offer their services to such vessel, and their offer is refused. *Ib.*

3. The eighth rule for regulating the pilotage of the harbor of Boston, prescribed by the commissioners of pilots, in 1835, was not intended to give, and does not give, the true meaning of the word "harbor," as used in the Rev. Sts. c. 32, and as understood by those who navigate the waters of the bay. *Ib.*

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4. In a suit, by a pilot of the harbor of Boston, to recover pilotage fees of the master of a vessel which was subject to the pilotage laws, and bound to Weymouth, and to whom the plaintiff had seasonably offered to pilot the vessel through the waters of his district, and then leave the defendant to take a river pilot, it was *held*, that parol evidence was admissible to show that the waters of the "harbor of Boston" (which was the pilot's district) extended only to the mouths of the rivers emptying into that harbor, and also to show a usage of the pilots, for the last forty years, to pilot vessels, that were to unlade at towns situated on said rivers, as far as the mouths of the rivers, and then leave them to take a river pilot. *Ib.*

PLEADING.

Parties to Actions. See COVENANT, 2. EVIDENCE, 16. EXECUTOR, &c. 1 PROMISSORY NOTE, 5.

POLICE OFFICER.

L. was appointed, by the mayor and aldermen of Boston, under St. 1838, c. 123, "a police officer, (at the National Theatre,) with the power of a constable, except the power of serving civil process." *Held*, that if L.'s power was limited to a part of the city, yet that it was not limited to the space within the walls of the theatre, but extended to the environs, so far as the special vigilance of an officer might be required to keep the peace and preserve order among persons frequenting the theatre, or carrying others to and from it, or supplying refreshments; and also to shops, stalls and stands, kept in the vicinity, for the purpose of supplying refreshments. *Commonwealth* v. *Hastings*, 259.

See ARREST.

POOR DEBTORS.

1. The provision in St. 1842, c. 56, § 1, that a person "arrested on mesne process, or execution, for any debt, may give notice to the officer having him in custody, or, if he be then bailed, to the officer who made the arrest, that he is desirous to take the oath prescribed for poor debtors confined on execution," authorizes a debtor who is committed on execution, and gives bond for the liberty of the jail limits, to give such notice to the jailer. *Jenkins* v. *Newell*, 303.
2. Under the Rev. Sts. c. 98, when charges of fraud are alleged against a party who seeks to take the poor debtors' oath, and the examining magistrates render a judgment in his favor, it is their duty to administer the oath to him, and to make a certificate thereof to the jailer, although the creditor appeals from their judgment; and the debtor is thereupon to be discharged from imprisonment; or, if he is at large on bail when the oath is taken, his bail are thereby discharged. *Ingersoll* v. *Strong*, 447.

PRESUMPTION.

See EVIDENCE, 5. MURDER.

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PRINCIPAL AND AGENT.

1. A. and B., joint owners of part of a vessel, authorized C., another owner, to purchase their proportion of the outfits of the vessel, but did not furnish him with funds: C. purchased the outfits on a credit of six months, and gave a note therefor, as agent of A. and B., payable in six months: A. and B., not knowing that C. had purchased on credit, paid him the amount of the purchase, in two months after it was made: C. did not pay the note at maturity, and the vendor of the outfits sued A. and B. therefor, in an action for goods sold and delivered. *Held*, that he was entitled to recover. *Sprague* v. *Gillett*, 91.

2. The owners of a tavern, by an instrument in which they recited that they had engaged R. to keep said tavern, empowered him, for them, and in their names, and for their use and benefit, to transact all business pertaining to said tavern, which, in his judgment, might promote their interest, and "to purchase, use and vend all necessary provisions for said house." *Held*, that R. was authorized to purchase spiritous liquors, wine and sugar on the credit of the owners, to be used at the bar of said tavern. *Cummings* v. *Sargent*, 172.

PROMISSORY NOTE.

1. The provision in St. 1839, c. 121, § 1, that, in a suit by an indorsee against the maker of a promissory note payable on demand, "any matter shall be deemed a legal defence, and may be given in evidence accordingly, which would be a legal defence to a suit on the same note, if brought by the promisee," entitles the maker to set off, in such suit, a judgment recovered by him against the promisee. *Lewis* v. *Brooks*, 367.

2. A notice to the indorser of a note, which merely states that the note remains unpaid, and that the holders look to him for payment, is not sufficient to charge the indorser, although such notice is given by a notary public. *Pinkham* v. *Macy*, 174.

3. P., the second indorser of a note, residing in New York, duly received notice from a notary public of the dishonor of the note, and also a like notice from the notary, addressed to S., the first indorser, who resided at Springfield, but whose residence was unknown to the notary: P., on the day on which he received these notices, transmitted to S., by mail, the notice addressed to him by the notary. *Held*, that this notice, so transmitted, was sufficient to render S. liable to P., who had paid the note *Palen* v. *Shurtleff*, 581.

4. When a bank is the holder of a note made payable at its banking house, the indorser is bound by a notice of non-payment by the maker, given conformably to the established usage of the bank, though not conformably to the general law. *Chicopee Bank* v. *Eager*, 583.

5. When a note is indorsed in blank, an action in the name of a third person may be maintained against the indorser, for the benefit of the indorsee, with his consent. *Beekman* v. *Wilson*, 434.

6. When a promissory note, that has been negotiated, comes into the pos-

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session of one of the parties liable to pay it, such possession is *prima facie* evidence of payment by him, and he is to be treated as the *bona fide* holder, unless the contrary is made to appear. *M'Gee* v. *Prouty*, 547

7. S., of the firm of S., B. and C., gave a note to P. for a debt due from him alone to P.: P. afterwards became indebted to the firm, on account, in a sum larger than the amount of S.'s note to him, and C., one of the firm, requested payment of P., who paid a part thereof to C., saying that he held S.'s note, which he intended to turn in for the balance of the account: C. thereupon told P. that, if S. owed him, all was right; and C. considered it as understood and agreed that the matter was to be arranged as P. had proposed, and so stated to S., who agreed thereto; but no communication on the subject was made to B., nor was the note given up, nor credit given for it in account. *Held*, in a suit by P.'s administrator against S., on the note, that P.'s debt to the firm could not be set off against the note, and that the agreement between C. and P., to which S. assented, was not an accord and satisfaction, nor a payment, nor a substitution of the debt of S. to P. for P.'s debt to the firm, so as to bar the action on the note. *Dehon* v *Stetson*, 341.

8. When a promissory note, given for a chattel that is warranted to the promisor by the payee, is indorsed after it is dishonored, and the indorsee sues the promisor on the money counts, and gives the note in evidence, the promisor may show that the chattel was not such as it was warranted to be; and he is thereupon entitled to have so much deducted from the amount of the note, as the chattel by reason of its defects, was worth less than it would have been, if the defects had not existed; but he is not entitled to a deduction of the difference between the amount of the note and the sum which the jury may deem the true value of the chattel. *Goodwin* v. *Morse*, 278.

See EVIDENCE, 8. GUARANTY.

RAIL ROAD CORPORATION.

A. granted to the Western Rail Road Corporation full and free license and authority to locate, construct, repair and forever maintain and use a rail road, upon, through, and over his land, and to take his land therefor, to the extent authorized by their charter: The land was so situated that the embankment of the rail road would cause water to accumulate on the upper side thereof, and it became necessary to provide for the passage of water to the lower side: The corporation therefore made culverts, in suitable places, and in a convenient manner; but the situation of the land was such that it was necessary to connect ditches with the culverts, and extend the ditches, beyond the line of the location of the rail road, into the land of A., in order to prevent the water from setting back so as materially to injure the rail road or damage the land of A. *Held*, that the corporation were authorized by said license so to make said culverts and ditches, under the rule of law, that a grant of a thing includes the means necessary to attain it. *Held also*, that the corporation were authorized, by said license, to deepen and widen, in the land of A., beyond the line of the location of the rail road, the bed of a mountain stream, over which the rail road was laid

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out and constructed, to facilitate the discharge of the waters of the stream; such deepening and widening being necessary to secure the rail road from damage, or to prevent the land of A. from being broken and washed away. *It seems*, also, that the corporation had authority to do the aforesaid acts, under their charter and the Rev. Sts. *c.* 39. *Babcock* v. *Western Rail Road Corporation*, 553.

RATIFICATION.

See ASSUMPSIT, 1. INFANT, 1.

RECOGNIZANCE.

A., who had been arrested and carried before a justice of the peace, was ordered to recognize, with sureties, to appear at a future day and abide said justice's order, and was committed to jail for not recognizing: Two magistrates afterwards took A.'s recognizance, with sureties, for his appearance, &c., pursuant to said justice's order, and A. was thereupon released from imprisonment; but he did not appear before the justice according to the conditions of his recognizance: The magistrates did not return the recognizance to the justice, but returned it to the court of common pleas held next after A.'s default. *Held*, that no action could be maintained on the recognizance. *Commonwealth* v. *Baird*, 407.

See WAY, 3.

RENTS AND PROFITS.

See EXECUTOR, &c. 5.

REPLEVIN.

A., by a writ of replevin against B., obtained possession of B.'s property, and sold it to C.: A.'s replevin suit was abated by his death, and no judgment was rendered therein: B. afterwards demanded the property of C., and, on C.'s refusal to give it up, replevied it. *Held*, that C. acquired no title to the property, by purchasing it of A., and that B. might well maintain an action of replevin against him. *Lockwood* v. *Perry*, 440.

RESERVATION.

See EASEMENT, 4.

RETURN.

See AMENDMENT, 3. EXECUTION, 3–5.

SALE.

See WARRANTY.

SELECTMEN

See SPRINGFIELD SCHOOL FUNDS. WAY, 6.

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SET-OFF.

1. A. borrowed money of an insurance company, and gave an unconditional promissory note therefor, payable in twelve months to the order of B., who, at the same time, indorsed it to the company for the accommodation of A. *Held*, in a suit on the note, brought by the company against B., that he could not set off, against the company's demand on the note, A.'s claims against the company on the policy of insurance. *St. Louis Perpetual Ins. Co.* v. *Homer*, 39.

2. Under the Rev. Sts. *c.* 97, if A. recovers a judgment for costs against an administrator who sues him in the capacity of administrator, and who, in the same capacity, recovers a judgment against A., the execution on A.'s judgment (except so much thereof as may be due to A.'s attorney) may be set off, if required by the administrator, against the execution on his judgment against A.; the administrator being creditor in the latter execution, in the same capacity and trust in which he is debtor in the former. *Jones* v. *Carpenter*, 509.

See EVIDENCE, 9. PROMISSORY NOTE, 1. 7.

SHIPS AND SHIPPING.

A vessel may be chartered by an oral contract; and such contract is not determined by the unlawful seizure and detention of the vessel by a stranger. *Muggridge* v *Eveleth*, 233.

SPIRITOUS LIQUOR.

Unlawful sale of. See INDICTMENT, 1–4

SPRINGFIELD SCHOOL FUNDS.

By St. 1809, *c.* 86, trustees of the school funds in the town of Springfield were incorporated, with authority to sell and convey such lands as the town had directed, or should thereafter direct, to be sold for the use of schools: The town, in 1810, passed a vote, that said trustees be authorized to sell such parts of the land belonging to the town as the selectmen should, by writing, certify that it would be for the interest of the town to sell. *Held*, that future boards of selectmen, as well as the selectmen chosen for the year 1810, were intended by this vote. *Lumbard* v. *Trask*, 557.

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SURETY.

See COLLECTOR. EVIDENCE, 13 - 15.

SURVEYOR OF HIGHWAYS.

Under the Rev. Sts. c. 25, § 13, the only authority of a surveyor of highways to charge a town for repairs of a road, when the highway tax is insufficient therefor, is by employing other persons to make such repairs; and those persons, and not the surveyor, may recover pay of the town for their labor. *Armstrong* v. *Inhabitants of Wendell*, 522.

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TAXES.

1. A distress for the non-payment of a tax cannot be made after the death of the person on whom the tax is assessed. *Wilson* v. *Shearer*, 504.
2. The Boston Water Power Company are not taxable for their income, which is annually divided among the individual stockholders. *Boston Water Power Company* v. *City of Boston*, 199.
3. The Boston Water Power Company were taxed, on separate valuations, for their mill, and for land owned by them in fee, which was used solely for the flowing of water from their mill. *Held*, that if the mill and land might have been valued and assessed together, as one estate, and if the taxes, as assessed, were too large, yet that they were not void, and therefore, if paid, could not be recovered back by action; but that the remedy was by application to the proper authority for an abatement. *Ib.*
4. A clerk in a post office, who is appointed by the deputy postmaster, and his appointment approved by the postmaster general, is taxable for the income derived from his employment as such clerk. *Melcher* v. *City of Boston*, 73.

TELLER OF A BANK.

See BANK, 2-4.

TENDER.

A tender is not valid, if it be accompanied with a demand of a discharge of the party by whom or for whom the money is tendered. *Richardson* v *Boston Chemical Laboratory*, 42.

TRESPASS.

To maintain an action of trespass for taking and carrying away chattels, the plaintiff must have actual possession, or a right to immediate possession, at the time of the taking: Hence, a bailor of chattels cannot maintain trespass against one who unlawfully takes them from the bailee, during the continuance of the bailment; and this rule holds in case of an attachment of the chattels, by an officer, as the property of a third person. *Muggridge* v *Eveleth*, 233.

TROVER.

1. Goods were consigned to order, and one of the bills of lading was indorsed by the shipper, who was agent of the owner of the vessel and goods, and was forwarded by the master of the vessel to B., who, on the arrival of the goods, had no other right to them: After the arrival of the goods, the owner indorsed the duplicate bill of lading to the master, and mortgaged the goods to him: B. entered the goods at the custom house, as owner, in opposition to the master's attempt to enter them, and took them from the vessel, under a custom house permit, the master being on board, objecting and claiming the goods as his own. *Held*, that this was a conversion of the goods by B. and that he was liable to the master in an action of trover. *Bray* v. *Bates*, 237.
2. An oral agreement was made between W. and one of his sons, that the son should take a certain part of W.'s land to the halves: After W.'s death, the

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son cut the grass on said land, made it into hay, and deposited it in a barn on W.'s farm: W.'s administrator inventoried the hay, and afterwards divided it between himself and the son, in the presence of part of the other heirs of W.: S., a stranger, converted to his own use that part of the hay which was taken by the administrator. *Held*, that said hay, as against S., was the property of the administrator, and that he might maintain an action of trover against S. for the conversion. *Wilson* v. *Shearer*, 504.

TRUST AND TRUSTEE.

E. bequeathed all her shares or stock in two insurance offices to her sister M., to receive the interest or dividends thereof during M.'s life, and, at her decease, to S. and her children: S. then had two children, J. and G., and never had any others: E.'s executor received, from one of the insurance offices, $262·50, as a dividend of the capital stock thereof, and paid the same to M.: S. and G. died, and J. was administrator of their estates: J assigned to D. all his right, title, property, and claim in and to the shares bequeathed by E, and all his right, title, interest, and property in and to any other stocks or estates in which the proceeds of said shares might be thereafter invested, and covenanted that he was the sole and lawful owner of said shares, subject to the right of M. to receive the income thereof during life, and that he would make such further assurance as should be requisite to perfect the intent of the assignment; neither D. nor J. then knowing that said $262·50, had been paid to M. as a dividend of capital: Afterwards, E.'s executor, though he had notice of said assignment, made an absolute conveyance of said shares to M., who bequeathed the same and other property to her executor, upon certain trusts: D. brought a bill in equity against M.'s executor, to compel him to assign said shares to D. and to pay him the dividends received after M.'s death, and also said sum of $262·50. *Held*, that on the death of E., S. and her two children, J. and G., took a certain interest in the remainder bequeathed to them; that, whether this was vested or contingent, J. after the death of S. and G., became entitled to one third of the whole bequest to them, in his own right, and to two thirds, as administrator of their estates; and that he had a right to sell or transfer the same for his own benefit. *Held also*, that the $262·50 passed to D. by the assignment of J. *Held also*, that although the conveyance of the shares to M. by E.'s executor was a breach of trust, yet the legal title thereto passed to M. by the conveyance, and that she took them subject to a trust in favor of J., and that her executor was bound to assign them to D., and pay to D. all dividends received thereon after M.'s death, and also said sum of $262·50. *Dalton* v. *Savage*, 28.

See EXECUTOR, &c. 1. WILL, 1.

UNLAWFUL GAMES.

1. It is not necessary that there should be gaming or betting, in order to render the game of bowls or nine pins an unlawful game, in the cases mentioned in the Rev. Sts. c. 50, § 17. *Commonwealth* v. *Stowell*, 572.

2. By the Rev. Sts. c. 50, § 17, a person, not licensed as an innholder, &c.

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who, for hire, gain or reward, suffers persons, from time to time, to resort to a house, &c. by him used or occupied, for the purpose of playing at any unlawful game, does not commit a single continuing offence, but several distinct offences, and is liable to a penalty for each of them. *Ib*

See INDICTMENT, 8.

USAGE.

See BANK, 2-4. INSURANCE, 5. PILOT, &c. 3. PROMISSORY NOTE, 4.

USE AND OCCUPATION.

A. gave a bond to B., engaging to convey to him certain real estate, on his paying A. $5000 in three years, with yearly interest, and agreeing that B. might enter upon the estate, and retain possession thereof, so long as the bond should remain in force, without any charge for rent: B. entered and remained in possession three years, paid the first two years' interest on $5000, and then surrendered the estate to A. without paying the third year's interest. *Held*, that A. could not recover of B. pay for the use and occupation of the estate during the third year. *Welch* v. *Andrews*, 78.

VERDICT.

See BANKRUPT, 2.

VOTING.

See EVIDENCE, 1-3.

WAIVER.

See COVENANT, 4. NEW TRIAL.

WARRANTY.

When a bill of parcels is given, upon a sale of goods, describing the goods or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be: And this rule applies, though the goods are examined by the purchaser, at or before the sale, if they are so prepared, and present such an appearance, as to deceive skilful dealers. *Henshaw* v. *Robins*, 83.

WAY.

1 Under the Rev. Sts. c. 24, the question whether an adjudication as to a highway or a town way, made by county commissioners at the time of their view or at a special meeting, is to be regarded as final, or as subject to confirmation or reversal at a subsequent regular meeting, is to be determined by their intention, as manifested by their records. *Inhabitants of New Marlborough* v. *County Commissioners*, 423.

2. On a petition to county commissioners to alter a town way according to a report of selectmen, which the town was alleged to have unreasonably refused to accept, the commissioners gave notice to the town, had a view, and

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afterwards, at a special meeting, ordered that the petition be dismissed: This order was not recorded, nor filed with the clerk for record: At the next regular meeting of the commissioners, they ordered that "said report be not accepted," allowed the petition to be amended, and proceeded anew. *Held*, that the order at the special meeting was not final; that it was lawfully vacated at the regular meeting; and that the commissioners were thereupon authorized to proceed anew. *Ib.*

3. The omission of county commissioners to take a new recognizance for costs, upon an amended petition for an alteration of a town way, is no ground for a writ of *certiorari* to remove the record of their proceedings in altering the way conformably to such petition. *Ib.*
4. A petition to county commissioners to alter a town way alleged that the town had unreasonably refused to accept the report of the alteration thereof by the selectmen; and notice of the petition was served upon the town: The petition was afterwards amended, by striking out this allegation and alleging that the selectmen unreasonably refused to alter the way. *Held*, that a new notice to the town, by service of a copy of the amended petition only, was sufficient. *Ib.*
5. A defective notice, given to a town, of a petition to county commissioners to alter a town way, is no ground for a writ of *certiorari*, on the application of the town to remove the records of the commissioners' proceedings, if the town acted on such notice and appeared before the commissioners. *Ib.*
6. The omission of selectmen to make a written report to the town of their alteration of a town way, on a written petition for an alteration, is such a refusal or neglect to alter it as gives jurisdiction of the matter to the county commissioners, under the Rev. Sts, *c.* 24, § 71. *Ib.*

WILL.

1. A testator directed, by his will, that his son and his son's wife should be maintained by his executor, out of his estate, and that their children should also be so maintained until they should come of age: He further directed, that his estate, real and personal, should be kept by his executor, as a fund for the purpose of paying all the legacies given by his will, and for maintaining the persons aforesaid, and that, after such directions should be complied with, the residue of his estate, if any, should be divided among his grandchildren. *Held*, that both the real and personal estate of the testator vested in his executor upon the same trusts. *Kingsbury* v. *Gould*, 282.
2. A testator, leaving $80,000, and an only child, a son, who had several minor children, devised to his son's wife the use of one half of a house in which she lived, and one half of the furniture therein: He also directed his executor to maintain, out of his estate, his son and his son's wife, during life, taking their several receipts for the same, and also to maintain their children, until they should respectively come of age: The said house was small, uncomfortable and unsuitable for the son's family. *Held*, that the executor was authorized, and that it was his duty, to hire a house suitable for said family, if one could be hired, for five or seven years, in the town where

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said family resided; and that, if such house could not be there so hired, he was authorized, and it was his duty, to erect a house in said town, suitable for said family, and to purchase furniture suitable therefor. *Ib.*

3. A testator, after giving all his property to his wife during her life, made the following bequest: "Eleventh. I give and bequeath unto the legal heirs of my late sister Abigail the sum of $1000:" In the seventh article of his will, he bequeathed $1800 to the legal heirs of his late sister Grace: In the twenty first article, he bequeathed to S. and J., sons of his late sister Grace, his wearing apparel, "in addition to their proportion of the devise and bequest made to the legal heirs of Grace in the seventh article:" In the last article, he gave all the residue of his property "to the legal heirs" of his brothers and sisters, to whom he had, in previous articles, made devises and bequests, "to be divided between them in the same relative proportions in which" he had "already devised and bequeathed to them:" And he directed that the said several legacies and sums of money, given and bequeathed in his will, should be paid to the respective legatees, in two years after the death of his wife: At the time of the testator's death, three children of his deceased sister A. were alive, viz. T., Abigail and V.: Abigail died during the life of the testator's widow, leaving a will in which she bequeathed all her claims to the legacies given to the legal heirs of her mother. *Held*, that on the death of the testator, the legacies to the legal heirs of A. vested in A.'s said three children, severally and not jointly; and that T., Abigail's executor, and V. were each entitled to one third of the amount of those legacies. *Tillinghast* v. *Cook*, 143.

See Charitable Uses. Executor, &c. 5. Trust, &c.

WINDOWS.

See Covenant, 1. Easement, 4.

WITNESS.

1. A vendor of personal property, though he gives a bill of sale thereof, is a competent witness to prove that he had no title thereto; and though he sells with warranty of title, he is a competent witness, for this purpose, when called by a third person, who claims the property and brings an action of trover therefor against the vendee. *Dickinson* v. *Dickinson*, 471.

2. *It seems*, that the drawer of a bill of exchange payable to his own order, and by him indorsed, is a competent witness in a suit brought by the indorsee against the acceptor. *Pacific Bank* v. *Mitchell*, 297.

WORK AND LABOR.

See Infant, 2.

WRIT OF ENTRY.

See Equity. Evidence, 4. 17. Insolvent Debtors, 2

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